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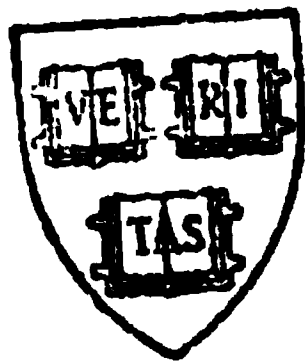
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VOL. 85—INDIANA REPORTS.

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE

OF THE
STATE OF INDIANA,

**WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.**

BY FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 85,

**CONTAINING CASES DECIDED AT THE NOVEMBER TERM,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM A. WOODS.* †
HON. WILLIAM E. NIBLACK. ‡
HON. GEORGE V. HOWK. ‡
HON. BYRON K. ELLIOTT. †
HON. ALLEN ZOLLARS. §
HON. WILLIAM H. COOMBS. ||

* Chief Justice at the November Term, 1882.

† Term of office commenced January 3d, 1881.

‡ Re-elected November 7th, 1883.

§ Term of office commenced January 1st, 1883.

|| Term of office expired January 1st, 1883.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE A. BICKNELL.*†

HON. JOHN MORRIS.†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.‡

• Chief Commissioner.

† Appointed April 27th, 1881.

‡ Appointed May 29th, 1882.

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OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
FREDERICK HEINER.

C A S E S
 ARGUED AND DETERMINED
 IN THE
 SUPREME COURT OF JUDICATURE
 OF THE
 STATE OF INDIANA,
 AT INDIANAPOLIS, NOVEMBER TERM, 1882, IN THE SIXTY-
 SEVENTH YEAR OF THE STATE.

85	1
125	309
85	1
148	357
150	301

No. 9325.

HILEMAN, ADMINISTRATOR, v. HILEMAN.

HUSBAND AND WIFE.—*Contract.*—*Wife's Separate Property.*—Under statutory provisions that a wife's separate property shall remain her own, and that she may contract concerning it, or part with it, only with the consent of the husband, her contract with the husband does not bind her.

SAME.—*Statute of Limitations.*—*Trust and Trustee.*—*Demand.*—If a wife sue her husband or the administrator of his estate upon his express promise to repay money received of her, the statute of limitations may be pleaded; but if, disregarding the contract, she treat him as a trustee, as she may, the statute affords no defence until after demand and refusal to account, or the equivalent thereof.

SAME.—*Presumption.*—*Husband a Trustee.*—The presumption under the statute is that the money or property of a wife acquired by descent, devise or gift, remains her separate property, and that, if the husband takes the possession and management thereof, he does it as trustee for her.

SAME.—If a husband collect or receive moneys owing or belonging to his wife, or instead thereof take up and cancel his own obligations, he is accountable to her.

SAME.—*Advancement to Daughter by Giving Credit to Husband.*—If a father make an advancement or gift to his daughter by reducing the price of land conveyed to her husband, the latter, in the absence of an express

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promise, is not liable to his wife, as trustee or otherwise, for the amount of the reduction.

PLEADING.—*Claim Against Estate*.—A formal complaint is not necessary in prosecuting a claim against an estate.

From the Madison Circuit Court.

C. L. Henry and *W. S. Diven*, for appellant.

J. W. Sansberry, *M. A. Chipman* and *H. C. Ryan*, for appellee.

WOODS, C. J.—The appellee obtained judgment for \$1,131.90, upon a complaint charging that the appellant's intestate, Robert Hileman, died "indebted to her for certain trust funds he had and held during his life and at the time of his death for her use and benefit." With the complaint is the following bill of particulars:

"June, 1864, to cash credited on indebtedness of	
Robert Hileman	\$ 300.00
Oct. 19th, 1865, from Paul Mauls, adm'r	315.00
* * * (Items amounting to)	463.33
March 20th, 1877, to cash received from the es-	
tate of Marion Tillson	225.00

"Total amount so received in trust \$1,303.33."

It is claimed that the verdict is not supported by the evidence and is contrary to law, and that the damages are excessive.

The evidence shows that the appellee and the decedent were husband and wife; that the decedent, while in life, purchased a tract of land of the appellee's father, and that as a gift or advancement to the appellee, on her share in her father's estate, the price of the land was made less by \$300 than otherwise it would have been, and for the remainder of the purchase-money, not otherwise paid, the decedent made his notes to the vendor. This is all the evidence in support of the first item of the bill of particulars.

In respect to the second item, the evidence shows the death of the appellee's father, and that, upon or in the course of the

Hileman, Administrator, v. Hileman.

settlement of his estate, there was coming to her, as an heir, a sum equal to the amount of that item, and that for that amount the deceased received and took up one of his notes given for the purchase-money of the land aforesaid; and, in support of the last item, it is shown that the appellee was entitled to a legacy under the last will of Marion Tillson, and that, instead of receiving the money, her husband took a credit for the amount on another of the notes aforesaid, which, upon the settlement of the estate of the appellee's father, had gone into the hands of the said Marion Tillson.

Upon these facts it is insisted, and we think correctly, that in respect to the first item, the claim of the appellee can not be sustained. There is nothing whatever in the evidence to show an agreement or understanding that the husband should account for or pay to the wife the sum so allowed him as a reduction upon the price of the land; and, in the absence of such an agreement or understanding, there is no principle of law which raises a promise to pay, nor of equity which either creates a trust in her favor in the land itself, or makes the husband liable for so much money received in trust for her. The transaction amounted to a gift to the husband.

In respect to the second and last items, it is claimed that the evidence fails because it does not show that the intestate received money or funds as charged in the complaint, but only credits on his own notes.

If the strict rules of pleading were applicable, this position would perhaps be maintainable; but it has been held that a formal complaint is not necessary in prosecuting a claim against an estate, a succinct statement of the nature and amount of the claim being all that the statute requires. *Ginn v. Collins*, 43 Ind. 271; *Post v. Pedrick*, 52 Ind. 490. The complaint in this instance, besides the bill of particulars, shows the sources from which the money was received by the intestate, and neither he nor his representative ought to be heard to say it was not money, merely because it consisted of his promises to pay money taken up instead of the

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money itself. Having taken his own notes, in lieu of money coming to his wife, and having presumably cancelled or destroyed the notes, instead of holding them for her use or turning them over to her, as he ought to have done, he may, without great impropriety of averment, be charged as holding the amount of the notes in trust for her.

In respect to the other items, there is sufficient evidence to show that the deceased received the amounts in money either from the appellee or from others for her; and those items, added to the second and last, make the sum of \$1,003.33 and leave but \$127.57 of the verdict to be accounted for, without consideration of the first item in the bill of particulars. The verdict was not rendered until after the lapse of two years and three months from the granting of letters, and interest for that time, added to the principal sum above named, approximates very nearly the damages awarded.

A number of exceptions were saved in reference to the giving, refusing and modifying of instructions; but the single question presented arises upon the sixth instruction given at the instance of the appellee, which reads in this wise:

“The presumption of law under our statute is that the money and property of the wife, that she has during her marriage acquired by descent, devise or gift, remains her separate property or money, even after her husband has taken possession of the same and assumed the management and control of it, and that he in good faith holds the same for her use and benefit; and before you can find the contrary in this case, you must be satisfied, by evidence sufficient to overcome that presumption, that such money or property was allowed to pass into the hands of her husband with the intention to make a gift of the same to him.”

This is in accord with the declaration in *Resor v. Resor*, 9 Ind. 347, where it is said: “We may remark that it has been often held that husband and wife were not, during the marriage, capable of making contracts with each other, without the intervention of a trustee, which would be enforced at law

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(*Doe v. Hurd*, 7 Blackf. 510.—*Fletcher v. Mansur*, 5 Ind. 267); but it has also been decided that courts of equity will hold the husband and his heirs trustees of the wife's separate property, if he take possession of it in any other way than by gift, express or implied." In support of this are cited *Barnett v. Goings*, 8 Blackf. 284; *Totten v. McManus*, 5 Ind. 407; *Wilkins v. Miller*, 9 Ind. 100; *Taggard v. Talcott*, 2 Edw. Ch. 628.

The exact objection made by the appellant to the instruction is that it omits, and by implication at least excludes, the proposition that the appellee might have loaned her money to her husband, and, if so, could not recover it in this action, because in such case the right of action had been barred by lapse of time, which, by force of statutory provision, was available to the appellant under his plea in general denial, without special plea. *Niblack v. Goodman*, 67 Ind. 174. See R. S. 1881, sec. 2324.

Many cases may be found wherein it has been held or said that a wife may loan money to her husband, and so make him her debtor in equity, but it is clear that at common law there can be no binding contracts between husband and wife; and where it has been provided by statute that her separate property shall remain her own, and she is authorized to make contracts concerning it, or to part with it, only with the consent of the husband, any attempt at making a contract with him must be without binding force upon her. 1 R. S. 1876, p. 550, sec. 5; p. 412, sec. 5; cases *supra*. See, also, *Dayton v. Fisher*, 34 Ind. 356; *Davis v. Davis*, 43 Ind. 561; *Smith v. Smith*, 80 Ind. 267; *Bassett v. Bassett*, 112 Mass. 99; *Jaycox v. Caldwell*, 51 N. Y. 395; *Savage v. O'Neil*, 44 N. Y. 298; *Campbell v. Campbell*, 21 Mich. 438; *Thoms v. Thoms*, 45 Miss. 263; *Ximines v. Smith*, 39 Tex. 49; *Monroe v. May*, 9 Kan. 466.

It may be that in case of an express promise of a husband to repay to his wife money received or borrowed of her, though not bound by the contract herself, she can, if she chooses, enforce it against him, and that, in a suit brought for that purpose, the statute of limitations can be pleaded to the

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action ; but, on the other hand, we deem it also clear that she may in such case disregard the contract entirely, and treat her husband as holding in trust for her the money or property of which he shall have obtained possession ; and, this being so, the statute of limitations does not commence to run until a demand has been made upon the trustee, or until there has been a repudiation of the trust. “It does not bar so long as the trust is continuing and acknowledged.” *Raymond v. Simonson*, 4 Blackf. 77 ; *Smith v. Calloway*, 7 Blackf. 86 ; *Cunningham v. McKindley*, 22 Ind. 149 ; *Albert v. State, ex rel.*, 65 Ind. 413.

It follows that if the instruction be conceded to be inaccurate in the respect suggested, the error was harmless. By the form of the complaint, the appellee elected to treat her husband as a trustee of the moneys for which she made claim against his estate, and, even if upon the evidence adduced the jury might have found that a loan was intended, and that the husband promised to repay—facts of which there is certainly no explicit evidence, and the circumstantial evidence, if any, very meager—it would have been immaterial in respect to the statute of limitations, because there is no evidence whatever upon which it can be claimed that the trust had been denied or a demand made before the death of the appellant’s intestate, and the action was brought within three years thereafter.

Judgment affirmed.

No. 9186.

HECK v. FINK ET AL.

SHERIFF’S SALE.—Notice.—Equity.—A purchaser of the legal title to lands at a sheriff’s sale, who, before completing his purchase, receives notice of an equity in the lands held by another than the execution defendant, takes subject to such equity.

From the Lake Circuit Court.

Heck v. Fink et al.

M. Wood and T. J. Wood, for appellant.

NIBLACK, J.—This was a suit by Matilda Fink and Margaret Bierlin against Christian Heck, Henry Sasse, Sr., Leonard Bierlin, Edward P. Farley, John Ruschli, and a considerable number of other persons, to obtain the legal title, and to have the same quieted, to lot No. 15, in Nichol's addition to the town of Crown Point, in Lake county.

The court tried the cause without a jury, and first made a finding that the defendants Farley and Ruschli had certain interests in the lot which were entitled to be protected against the claim of the plaintiffs, and decreed accordingly.

As between the plaintiffs and the defendants Heck and Sasse, the court made a special finding of the facts, which may be stated as follows :

That, in the year 1861, the plaintiff Margaret Bierlin was the wife of one Charles Fink ; that in that year the said Charles purchased the lot in controversy of one Major Allman for the sum of \$250, for which he executed three promissory notes, receiving in return a title-bond for the lot from the said Allman ; that the said Charles took possession of the lot under the title-bond, and fenced it in, as well as planting trees upon it, and afterwards paid about \$61 of the purchase-money ; that the said Charles died in the year 1863, leaving the said Margaret as his widow, and the said Matilda as his only child and lineal descendant, she being also the child of the said Margaret, and being seized of the lot in suit in the manner above stated, as well as the owner of other property ; that, in 1864, the plaintiff Margaret intermarried with the defendant Leonard Bierlin, with whom she has ever since lived as his wife ; that after his marriage with the said Margaret, the said Leonard, without any assignment, either legal or equitable, of the title-bond to him, paid the balance due on the purchase-money of the lot out of his own means, said balance being about the sum of \$265, and, on the 12th day of September, 1868, without the knowledge or consent of either one of the plaintiffs,

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took a deed for the lot in his own name, which deed was duly recorded on the 6th day of April, 1872; that, in the year 1867, the said Leonard and the said Margaret sold and conveyed another tract of land, of which the said Charles died seized, for the sum of \$2,000, which sum the said Leonard, at the instance of the plaintiffs, expended and used in the erection of a dwelling-house, and in making other improvements, on the lot described in the complaint; that said dwelling-house was erected in 1869, and has ever since been occupied as a family residence by the plaintiffs and the said Leonard; that, in the year 1875, the said Leonard became indebted to the defendant Heck, upon a promissory note on which he, the said Heck, took a judgment for \$150 and costs of suit, in the Lake Circuit Court, in 1876, against the said Leonard; that in the year 1875 the said Leonard also became indebted to the defendant Sasse, upon a promissory note on which one Lehman was surety, and upon which Sasse obtained judgment in the same court, in the year 1879, for the sum of \$100 and costs of suit; that, on the 23d day of March, 1879, Heck caused the lot sued for to be exposed to sale by the proper sheriff upon an execution issued upon his judgment, and bid in the lot as the purchaser thereof, for the amount of principal, interest and costs due on the judgment; that, at the time he bid in the lot, Heck had no notice or knowledge of the alleged equitable claim of the plaintiffs to the same, but that, on the 22d day of April, 1879, before he had receipted the execution or judgment, or paid any money upon his purchase, he received notice that the plaintiffs claimed to be the equitable owners of the lot under the title-bond.

Upon these facts the court came to the conclusion that the title of the plaintiffs was paramount to the liens of both Heck and Sasse, and that both of the last named persons should be enjoined and inhibited from setting up any lien, claim or title to the lot in dispute, adverse to the plaintiffs, under their respective judgments, or any sale upon any execution thereon.

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Heck and Sasse severally excepted to the conclusion of law at which the court arrived.

Judgment was thereupon rendered in favor of the plaintiffs in accordance with the conclusion of the court as above stated, and quieting the title of the plaintiffs as against all the defendants except Farley and Ruschli, above named.

Heck alone has appealed, and the only question we are required to decide is, did the court, as to him, err in the legal conclusion at which it arrived upon the facts presented by the special finding?

It is now well settled, and so well settled as to have become practically an elementary principle in the law governing real estate, that land in the hands of a purchaser is chargeable with all the claims, whether legal or equitable, which third parties may have upon it, of which such purchaser may have had notice before the completion of his contract. *Hilliard Vendors*, 398; *Hunter v. Bales*, 24 Ind. 299; *Earle v. Peterson*, 67 Ind. 503.

In referring to the notice necessary to charge land in such cases in the hands of a purchaser, Sugden on Vendors, at page 752, says: "Notice, before actual payment of all the money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract." *Lewis v. Phillips*, 17 Ind. 108; *Walker v. Cox*, 25 Ind. 271; *Wilson v. Hunter*, 30 Ind. 466.

This court has in effect decided that the doctrine as to notice, or the want of notice, of claims of third parties, is applicable as well to purchasers of real estate upon execution as to persons purchasing at private sale, and the conclusion reached, in that respect, is one which we think ought to be adhered to in cases like the one at bar. *Glidewell v. Spaugh*, 26 Ind. 319; *Milner v. Hyland*, 77 Ind. 458.

As the court found that Heck received notice of the equitable title of the plaintiffs before he completed his purchase of the lot on his execution against Bierlin, it was justified in

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reaching the conclusion that the title of the plaintiffs was superior to any right which he, Heck, had acquired under the sheriff's sale.

The judgment is affirmed, with costs.

Opinion filed at the May term, 1882.

Petition for a rehearing overruled at the November term, 1882.

No. 8955.

WILSON ET AL. v. THE TOWN OF MONTICELLO.

PRINCIPAL AND SURETY.—*Bond.*—*Agent.*—*Town.*—*Conversion.*—*Release of Surety.*—*Pleading.*—*Consideration.*—*Estoppel.*—*Fraud.*—*Demand.*—*Accounting.*—*Practice.*—An incorporated town, having bonds outstanding, issued to raise funds to erect a school-house, executed new bonds at a lower rate of interest, with a view to refund its debt, and appointed an agent to sell them. Afterwards the agent returned a part of these, and then, in consideration that he might retain those not returned, and that those returned would be again entrusted to him to negotiate and with the proceeds take up the old bonds, he gave bond with sureties, conditioned to perform said duties, and to account after a fixed date, it being recited in the bond that the securities were "this day delivered" to him. He became a defaulter and fled to parts unknown.

Held, that a complaint by the town on the bond, alleging the above facts, was good on demurrer.

Held, also, that the bond was executed on a concurrent and not a past consideration.

Held, also, that neither the agent nor his sureties could question the validity of either the old or new bonds, or the right of the town to the proceeds of the latter.

Held, also, that, the agent having absconded to parts unknown, a demand upon him was excused.

Held, also, that an answer by the sureties, that before the commencement of the suit it was known to the plaintiff that the agent had converted the bonds to his own use, and that it did not inform the sureties, was bad on demurrer.

Held, also, that an answer, denying that any demand for an accounting had been made on the agent, was bad on demurrer.

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85	10
155	75

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Held, also, that an answer by the sureties, denying the delivery of the bond sued on, is embraced in the general denial, and where the latter is pleaded there is no available error in sustaining a demurrer to the former.

Held, also, that an answer by the sureties, that the plaintiff knew and concealed from them the fact that the agent had, before the bond was executed, disposed of the securities not returned, and also represented to them that he then had them in his hands, whereby they were deceived and induced to become sureties, was not embraced in the general denial, nor in an answer alleging want of consideration, and was a good defence.

Held, also, that by the terms of the bond the sureties were liable only for the securities delivered to the agent on and after its date.

PRACTICE.—*Supreme Court*.—Where a good defence has been erroneously stricken out, the Supreme Court will reverse the cause, and will not examine the evidence.

From the Jasper Circuit Court.

J. Applegate, — *Palmer, A. W. Reynolds* and *E. B. Sellers*, for appellants.

H. P. Owens, W. E. Uhl and *D. P. Baldwin*, for appellee.

ELLIOTT, J.—The first paragraph of the appellee's complaint alleges, that in the month of May, 1878, it had outstanding, in the hands of *bona fide* holders, bonds to the amount of \$21,000, which had been executed for the purpose of raising money to erect a school-house; that, for the purpose of substituting for these bonds others bearing a lower rate of interest, the appellee appointed Joseph C. Wilson an agent to negotiate and sell bonds issued by its board of trustees, and placed in his hands bonds to the amount of \$21,000; that afterwards, in September of the same year, the board of trustees directed Wilson to return the bonds in his hands, and that he did return part of them; that on the 3d day of February, 1879, in consideration that appellee would again place in his, Wilson's, hands, the bonds returned by him and permit him to negotiate them and pay the outstanding bonds, the appellants executed their bond, in which is written the following: "The conditions of the above obligation are such, that, whereas the trustees of the said town have this day delivered

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to the above bound Joseph C. Wilson the bonds of said town, amounting to \$21,000, to be by him sold or exchanged for old bonds heretofore issued by the board of trustees of said town: Now, if the said Joseph C. Wilson shall account to, and pay over to the board of trustees all money derived from the first above mentioned bonds, deliver to the said board or said treasurer all old bonds taken by him in exchange for said first mentioned bonds and return to said board all bonds undisposed of when called upon by said board of trustees after July 9th, 1879, then this bond shall be void, else to remain in full force and effect in law." It is further alleged that the appellee did, on the 3d day of February, 1879, accept the obligation executed by appellants, and did deliver to Wilson one hundred and thirty bonds of the denomination of \$100 each, and did consent that he might retain the eighty bonds theretofore delivered to him; that prior to the 3d of February, 1879, Wilson had sold sixty of the eighty bonds not delivered under the order of the trustees; that he then had in his possession \$6,000, which he had received for the bonds sold by him. The facts constituting the breach of the bond are properly stated.

The complaint shows that the bond was executed upon a concurrent and not upon a past consideration, and that such a consideration will support a contract is one of the plainest rules of elementary law. The agreement that Wilson might retain what he had already received was not, as counsel suppose, a past consideration. A creditor who agrees to allow his debtor to retain property or money already in his hands, supplies a consideration for a contract, and this is so although no specific time is agreed upon. *Wills v. Ross*, 77 Ind. 1 (40 Am. R. 279); *Hakes v. Hotchkiss*, 23 Vt. 231; *Oldershaw v. King*, 2 H. & N. 517. But there was a delivery of bonds at the time the bond was executed, and this makes the complaint good for part, at least, of the relief demanded, and this enables it to repel the demurrer. *Bayless v. Glenn*, 72 Ind. 5.

It is contended that the town of Monticello had no author-

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ity to issue the bonds placed in Wilson's hands, and that, therefore, his sureties are not liable on the obligation sued on. We think the sureties are not in a situation to question the authority of the town to issue the bonds placed in Wilson's hands as its agent under his agreement to use them in payment of its outstanding indebtedness. It is a familiar doctrine that an agent who receives money on account of his principal can not escape an accounting upon the ground that his principal had no right to engage in the transaction which yielded the money. There are many cases extending this rule to sureties, upon the ground that when the principal is bound so also is the surety. In *City of Indianapolis v. Skeen*, 17 Ind. 628, the facts were that Skeen was appointed the agent of the city to negotiate its bonds; he pledged them and refused to account for the proceeds, and the court held that neither he nor the sureties upon the bond which he had executed for the faithful performance of his trust could be heard to say that the municipality had transcended its power in issuing the bonds placed in his hands. In the case of *Supervisor, etc., v. Bates*, 17 N. Y. 242, a like principle was declared and enforced. The court there said: "But, however illegal the proceedings of the board of supervisors may have been, Sherry was not at liberty to deny their validity. He accepted the appointment of treasurer, and undertook, as the agent of the board, to execute the power conferred upon him. The defendant also, as the surety of Sherry, agreed with the board of supervisors that he should faithfully account for such moneys as should come into his hands as such agent. Though called treasurer, he was in fact the agent of the board of supervisors; and both he and his sureties are precluded from questioning the power of the board, as principals, to confer upon him the authority under which he acted." *People v. Norton*, 5 Seld. 176, and *State v. City of Buffalo*, 2 Hill, 434, are cited by the court, and fully sustain its decision. In other States the general doctrine has received unqualified approval. *Boehmer v. County of Schuylkill*, 46 Pa. St. 452; *Wylie v. Gallagher*, 46

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Pa. St. 205; *McLean v. State*, 8 Heiskell, 22, *vide* opinion, p. 255; *Miller v. Moore*, 3 Humphrey, 189; *McGuire v. Bry*, 3 Rob. La. 196; *Mississippi Co. v. Jackson*, 51 Mo. 23. The case before us does not require us to go as far as the doctrine of the cases cited, for here the agent was authorized to dispose of bonds to pay a debt already contracted, and he certainly has no right to contest the validity of the original debt. *Little Rock v. Merchants' National Bank*, 98 U. S. 308. It is a familiar principle, recognized in *City of Indianapolis v. Skeen*, *supra*, as well as in many of our cases, that a city or town may issue bonds, notes or other evidences of indebtedness, to pay an existing debt. It would be strange, indeed, if an agent and his sureties could be permitted to receive negotiable securities issued to pay bonds due *bona fide* holders, under an agreement to use them for that purpose, and, after having received the money for them, defeat the principal upon the ground that the original debt was contracted without authority.

It is the general rule, that an agent can not be sued for money collected by him until a demand has been made upon him by the principal; but an excuse for the failure to make a demand is, if a sufficient one, equivalent to a demand. The complaint before us shows such an excuse, for it shows that the agent had fled the country, and that the appellee had no knowledge of his tarrying place.

It is argued that the money derived from the sale of the bonds is not that of the town but of the school corporation. Nothing can be plainer than that the agent and his sureties are not in a situation to deny the appellee's right to this money. They contracted with the town that the agent should receive and dispose of the bonds as the property of the town, should account to it for all money received, and they can not be heard to aver that the money is not that of the town. It was so received, and must be so accounted for.

The sixth paragraph of the separate answer of the sureties alleges, that Wilson had converted bonds to his own use prior to the commencement of the action, and that although this

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fact was known to appellee, it was not communicated to them. The bond and contract expressly provided that Wilson should retain the bonds and proceeds until July 1st, 1879, and until that time the appellee had no right to interfere with his disposition of them. The bond bound Wilson to account when called upon after that date, and until then there could have been no default on his part, no matter how he may have used the proceeds of the bonds placed in his hands for negotiation. The case is unlike that of one who entrusts an agent with money after he has detected him in the commission of a dishonest act, for here the agent had received all that the principal was to entrust him with before any wrong was committed. It is unlike the case of a dishonest servant, whom the master may discharge at any time for misconduct, for the right of the agent to retain the bonds, or their proceeds, was for a fixed time, and until the expiration of that time he could neither be discharged nor required to account.

Where an agent is employed to negotiate bonds placed in his hands, before or at the time of making the contract, and, under the terms of the contract, is entitled to hold them, or their proceeds, until a designated time, his sureties can not escape liability upon the ground, that before the expiration of the time fixed for the accounting, he had used the bonds or their proceeds. This is so even though the principal may have had notice that the agent has so used the funds entrusted to him, because, until the time for accounting has arrived, the agent has full control of the funds placed in his hands under the contract.

The seventh and eighth paragraphs of the answer deny that a demand for an accounting was made; but they neither deny nor avoid the matters averred as an excuse for not making the demand. Since, as we have seen, the excuse is valid, an answer which neither avoids nor denies it must be bad.

The tenth paragraph of the answer of the sureties admits the signing of the bond sued on, and avers that they permitted Wilson to take possession of it, "but gave no one any

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authority, except such as may be implied from that act, to deliver it to the appellee." If this answer amounts to anything at all—a question we need not stop to consider or decide—it is a mere argumentative denial of the execution of the bond, and is embraced in the general denial pleaded in the first paragraph of the answer. No harm resulted from the ruling declaring it bad, even though the theory that it is good should be the correct one.

The fourth and fifth paragraphs of the answer are substantially the same, and were both struck out on motion of the appellee. These paragraphs allege that the town bonds were delivered to Wilson eight months prior to the execution of the obligation sued on; that they had been disposed of by him prior to that time; that the appellee knew this fact and concealed it from the sureties, and represented to them that Wilson had in his hands, at the date of the execution of their obligation, "all the bonds then and before that time entrusted to him;" that they were ignorant of the fact that he had converted the proceeds of the bonds placed in his hands to his own use, and would not have undertaken as sureties for him had they known that he had appropriated the proceeds of the bonds to his own use.

The appellee defends the action of the court in striking out these answers upon the ground that they are the same as other paragraphs of the answer. It is argued that the same evidence, which these paragraphs would have entitled the appellants to give, was admissible under the third paragraph, which was a general plea of want of consideration. This argument is unsound.

It is the duty of a principal, who accepts surety for the faithful performance of duty by his agent, to act in good faith toward the person undertaking as surety, and he is guilty of fraud if he conceals any material fact which it was his duty to disclose, or makes a false statement of any material matter. The answers before us charge that the appellee's trustees fraudulently and falsely represented that the agent had

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accounted for all bonds received by him, and this was a material matter. The answers, therefore, state the defence of fraud, which is essentially different from that of want of consideration. Fraud must be specially pleaded. *Curry v. Keyser*, 30 Ind. 214; *Joest v. Williams*, 42 Ind. 565 (13 Am. R. 377); *Langsdale v. Girton*, 51 Ind. 99.

The plea of want of consideration requires for its support evidence essentially different from that required to support the defence of fraud. Such a plea is not supported by proof of a partial failure of consideration. *Crow v. Eichinger*, 34 Ind. 65; *Smock v. Pierson*, 68 Ind. 405 (34 Am. R. 269); *Wheelock v. Barney*, 27 Ind. 462. As the defences of want of consideration and of fraud are so different in their character, separate pleas are necessary, and if separate pleas are required, then the defence of fraud can not be made available under the plea of want of consideration.

A surety may defeat an action upon the ground of fraud, although his principal may have received all the consideration for which he bargained. If the surety proves that the creditor fraudulently concealed a material fact, or made a false representation of some material matter, he is entitled to release without supplementing this proof by evidence of want or failure of consideration. 1 Story Eq. 215; *Graves v. Lebanon Nat'l Bank*, 10 Bush, (Ky.) 23; S. C., 19 Am. Rep. 50; *Wayne v. Commercial National Bank*, 52 Pa. St. 343; *Railton v. Mathews*, 10 Clark & F. 934; *Ham v. Greve*, 34 Ind. 18. On the other hand, proof of want of consideration would entitle the surety to a discharge, irrespective of the question of fraud.

It is true of the great majority of cases that the consideration moves to the principal, and it certainly can not be the law that in such cases the defence of fraud can only be made available to the surety by showing that there was a want of consideration. It is plain that the principal may have received all the consideration agreed upon, and yet the surety be entitled to defend upon the ground of fraud, for, as he received

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no actual benefit from the contract, there is in his hands no real consideration to be accounted for or returned. What the rule is in cases where the surety receives a consideration of value distinct and different from that moving to the principal, we need not enquire; for here there was no consideration except such as moved to the principal.

It is argued by the appellee that the evidence which would have been competent under the fourth and fifth paragraphs, had they been allowed to stand, was admissible under the general denial, and for that reason there is no error in the ruling striking them out.

We have already shown that the general rule is that fraud must be specially pleaded, and is not admissible in evidence under the general denial. Unless this case forms some exception to the general rule, the defences stated in the rejected paragraphs were not embraced within the denial pleaded in the first paragraph of the answer.

The argument of counsel is this: "If these answers do not amount to a plea of want of consideration, all the material facts therein alleged are admissible under the general denial, as they simply negative certain facts stated in the complaint. The complaint avers that the bonds in question were delivered to Wilson at the time the bond was executed, and afterwards converted by him to his own use." We have quoted all that counsel say upon this point, and find nothing in their statement upon which their position can be sustained. The sureties were entitled to defend upon the ground of fraud, and the appellee could not anticipate this defence by alleging matters which were not essential to the cause of action; and it is only such matters as the plaintiff is bound to prove to make out a *prima facie* case, that the general denial puts in issue. It does not entitle the defendant, except in cases where express provision to the contrary is made, to give affirmative defences in evidence.

There is, however, no necessity for discussing this case upon the theory that the complaint avers that there was a delivery

to Wilson of all of the 210 town bonds at the time of or subsequent to the execution of the obligation in suit, for the allegation upon this point is essentially different. The allegation is that Wilson had in his hands, before the execution of the obligation, sixty, or, as some of the paragraphs allege, eighty, of the bonds, and that the verbal agreement was that he should return them. It is very evident, therefore, that the general denial did not require proof of delivery of all the town bonds subsequent to the execution of the obligation in suit, and, this being so, it is plain that the sureties had a right to plead that fraudulent representations were made to them concerning the delivery and disposition of the sixty bonds placed in Wilson's hands prior to the execution of the obligation sued on.

There is an important difference between the issue presented by the general denial and the answers setting up fraud. If the appellants could show that fraudulent representations were made concerning the agent's disposition of part of the bonds, or could show false and fraudulent statements as to the time of delivery, they would be entitled to relief, although some of the bonds may have rightfully gone into the agent's hands under the contract. This is illustrated in some of the cases we have cited, which hold that where a bank cashier is at the time a defaulter and known to be so by the bank, and that fact is concealed from the sureties, they are entitled to a discharge, although the bank may thereafter deal with him as the contract requires. Again, if the town had justly delivered to Wilson some, but not all, of the bonds, and there was no fault on the part of its officers, it would be entitled to recover the value of the bonds so delivered; and no evidence of fraud could be given under the general denial which would defeat this right; whereas, if the town officers had been guilty of fraud, and the defence was properly pleaded, the sureties would be entitled to recover, although they could show that the false statements extended only to the disposition made of part of the bonds.

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If Wilson received part only of the bonds provided for by the obligation executed by the sureties, and these were delivered in good faith, and the appellee's officers were not guilty of any fraudulent or wrongful act, then the appellee would be entitled under the general denial to recover for such as were so received by Wilson and not accounted for as the obligation required, but this would not be so if the bonds had been previously delivered and a fraudulent appropriation been made by him, known to his principal, and the fact wrongfully concealed from the sureties. The defence of fraud did not, as is evident from what has been said, require the appellants to prove that all of the bonds had been wrongfully disposed of, for they would have made good their defence of fraud by proof that the agent was a defaulter and known to be such by the appellee at the time the obligation sued on was executed, and that this fact was fraudulently concealed from them.

It is a familiar rule that sureties are not held beyond the terms of their contract, and in this case the contract is that they shall be liable for "bonds this day," that is the day the obligation was executed, "delivered to" the agent. Their undertaking was to account for such bonds as were then or subsequently delivered to the agent, and a false representation that none had been previously delivered, or a fraudulent concealment of that fact, was a wrongful act, materially affecting the rights of the sureties. It was, therefore, a material and important defence that the rejected answers presented. Whatever view may be taken of the case, it is clear that the court erred in refusing the appellants the benefit of the defence set forth in those paragraphs.

Where good answers are held bad on demurrer or are rejected on motion, the defendant is entitled to the benefit of the exception reserved upon that ruling, unless there are others entitling him to put in evidence substantially the same matters as are pleaded in the answers held bad or rejected. The evidence is not to be looked to for the purpose of dis-

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covering whether the ruling did or did not do him harm. Where a plea is struck down, the presumption is that the rule of law involved in the ruling was acted upon throughout the case, and the defendant is not bound to again present the question. An objection once well and fully presented, and properly and adequately reserved, does not need to be repeated at subsequent stages of the case. A defendant who receives the judgment of the court upon his answer may accept that ruling as the declaration of the court that it would be useless to offer evidence under it, for if fully proved the defence set forth would not be allowed to prevail. Nor would it be just to a defendant, who has put in a valid plea, to hunt through the evidence to ascertain whether he was or was not injured, for he is entitled to the benefit of the explicit admission made by the demurrer. We need not, however, pursue this discussion further, for the question is firmly settled by authority. *Friddle v. Crane*, 68 Ind. 583; *Johnson v. Breedlove*, 72 Ind. 368; *Abell v. Riddle*, 75 Ind. 345; *Over v. Shannon*, 75 Ind. 352; *Conyers v. Mericles*, 75 Ind. 443; *Sims v. City of Frankfort*, 79 Ind. 446.

We do not deem it necessary to examine the questions presented upon the ruling denying a new trial, as the case must be again tried.

Judgment reversed.

No. 9612.

HUSTON ET AL., ADMINISTRATORS, v. THE FIRST NATIONAL BANK OF CENTERVILLE.

DECEDENTS' ESTATES.—*Allowance of Claims.*—*Notes not Payable in Bank.*—*Contract of Assignor.*—*Due Diligence.*—Where a claim is filed against the estate of a decedent, as the assignor of a promissory note not payable in a bank in this State, the contract of the assignor is a warranty that the maker of the note is liable thereon and able to pay it; and section

85	21
125	399
85	21
137	506
85	21
165	164

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5504, R. S. 1881, provides that the assignee of such note, having used due diligence in the premises, shall have his action against his immediate or any remote assignor.

SAME.—*Sufficiency of Claim.—Failure to use Due Diligence.—Sufficient Excuse.—Insolvency or Coverture of Maker.—Assignor's Request.*—A claim against the estate of a decedent, as the assignor of a promissory note not payable in a bank in this State, will be sufficient to withstand a demurrer thereto, for the want of facts, if it show either the use of due diligence in the premises against the maker of the note, or a sufficient excuse for the failure to use due diligence; and the insolvency or coverture of the maker of the note, or the request of the assignor not to sue such maker, will constitute a sufficient excuse.

SAME.—*Motion for New Trial.—Evidence.*—On the trial of such a claim against the assignor's estate, the excuse alleged in the claim, for the failure to use due diligence against the maker of the note, is a material part of the claimant's cause of action, and must be sustained by sufficient evidence; and where the record shows that no evidence was given on the trial to sustain the alleged excuse, a new trial should be granted.

SAME.—*Remote Assignee.—Defence.—Set-Off.—Negative Averment.—Burden of Proof.*—In section 5504, R. S. 1881, it is provided that, in a suit against a remote assignor of such a note, he shall have any defence which he might have had in a suit brought by his immediate assignee. In a suit by the assignee against the remote assignor of the note, where the defendant pleads a set-off against his immediate assignee, he must aver that he had no notice of the assignment to the plaintiff when he acquired such set-off; but, in proof, the burden of showing notice to the defendant of such assignment rests on the plaintiff.

From the Wayne Circuit Court.

C. H. Burchenal, for appellants.

H. C. Fox, for appellee.

Howk, J.—This was a claim by the appellee against the appellants, as the administrators of the estate of Thomas Huston, deceased. The appellee's claim or complaint contained two paragraphs, to each of which the appellants' demurrer, for the alleged insufficiency of the facts therein to constitute a cause of action, was overruled by the court and to this ruling they excepted. They then answered in six paragraphs, and the appellee's demurrer to the fifth paragraph, for the want of facts therein to constitute a defence to its action, was sustained by the court, and to this decision they ex-

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cepted. To the other paragraphs of answer the appellee replied in two paragraphs, to wit: 1. A general denial; and, 2. That the claims described in said paragraphs of answer were fully paid before the commencement of this action. The issues joined were tried by the court, and a finding was made for the appellee, and against the estate of appellants' intestate, in the sum of \$1,143.46, and judgment was rendered accordingly. The appellants' motion for a new trial having been overruled by the court, and their exceptions saved to this ruling, they have appealed from the judgment below to this court.

The following decisions of the circuit court have been assigned here as errors by the appellants:

1. In overruling their demurrer to the first paragraph of appellee's claim.

2. In overruling their demurrer to the second paragraph of appellee's claim.

3. In sustaining appellee's demurrer to the fifth paragraph of their answer; and,

4. In overruling their motion for a new trial.

In the first paragraph of its claim or complaint, the appellee alleged, in substance, that on the 13th day of July, 1874, William S. T. Morton and Eliza M. Morton, by their promissory note of that date, promised to pay Thomas Huston, six months after date, \$1,000, with interest from date at the rate of ten per cent. per annum; that Eliza M. Morton, at the time she executed the note, was a married woman and the wife of William S. T. Morton; that after its execution Thomas Huston, the payee of the note, for value received, assigned the same by the following endorsement thereon: "Pay J. W. Swafford," (signed) "Thomas Huston," and delivering the same to one Jeremiah W. Swafford; that the said Swafford, being indebted to appellee in a large sum of money, assigned the said note, by endorsing his name thereon, and delivered the same, to the appellee; and that the appellee was then the owner and holder of said note. And the appellee averred

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that after the execution of said note the said William S. T. Morton died testate, at Wayne county, Indiana; that within one year after the death of said Morton, and before there had been any distribution of the assets of his estate, the said claim was presented to and filed with the executors of the decedent's will, who afterwards, on March 17th, 1879, paid thereon a dividend of twenty-five per cent. of said claim, which should be a credit thereon, being the full *pro rata* share of the assets of said estate, due on said note upon distribution, and as large a *pro rata* amount as was or had been, then or since, paid upon any claim of any general creditor of the estate, not secured by a lien upon the decedent's property; that said claim had since been filed and allowed by the court below as a valid claim against said estate, and the residue of said claim was then due and unpaid; that no amount had been paid upon said claim, "save as aforesaid at the time aforesaid," nor had there been any other claim against said estate, there being no available assets in the hands of said executors.

And the appellee further said that no final settlement of said estate had been made, and would not be for at least twelve months; that the estate was and had been declared by the court insolvent, there not being assets sufficient to pay the indebtedness thereof; that the assets of the estate had been exhausted, or nearly so, by the executors in paying preferred claims, costs of administration and the aforesaid dividend; that the assets remaining in the hands of the executors would not be sufficient to pay more than five per cent. dividend on the indebtedness of the estate; that the assignees of said note did not bring suit against the maker of the note, at its maturity or afterwards, up to the time of his death, nor proceed against his estate afterwards, "for the reason that the said Huston requested them not to do so, and that time should be given to the maker to pay the said note, without suit;" that, after the death of said William S. T. Morton, the said Thomas Huston died at said Wayne county, on the — day of ———, 187—, and his estate was being administered under the super-

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vision of the court below ; that the appellee had been informed and believed that said estate would be speedily settled, and, for that reason, this claim had been filed against said estate before the final settlement of the estate of said Morton ; and the appellee asked that the unpaid balance of said claim might be allowed against the estate of the decedent, Huston.

The appellee's claim was filed against the estate of Thomas Huston, deceased, and the appellants, as the administrators of said estate, on the 17th day of June, 1879. The first paragraph of the claim counts upon the contract of Thomas Huston, as the remote assignor of the appellee of the note described in said paragraph. The note was not payable at a bank in this State, and was not negotiable as an inland bill of exchange ; but it was negotiable under the statute of this State, and the rights of the appellee, as assignee, and the liabilities of the estate of appellants' intestate, as assignor, are fixed and measured by the statute, and not by the law merchant. The contract of the assignor of such a note is a warranty that the maker is liable on the note and able to pay it. *Black v. Duncan*, 60 Ind. 522 ; *Ward v. Haggard*, 75 Ind. 381 ; *Willson v. Binford*, 81 Ind. 588.

In section 5504, R. S. 1881, it is provided that the assignee of such a note, "having used due diligence in the premises, shall have his action against his immediate or any remote endorser." Where the assignee sues the assignor of such a note, his complaint must show by its allegations of facts, that he had used due diligence in the premises against the maker of the note, without success in whole or in part ; or else it must show that, at the maturity of the note, the maker was and had since remained wholly insolvent, so that no part of the debt could have been collected from him, by the exercise of due diligence in the recovery of judgment and the issue of execution thereon. *Roberts v. Masters*, 40 Ind. 461 ; *Markel v. Evans*, 47 Ind. 326 ; *Binford v. Willson*, 65 Ind. 70.

The consideration of the contract of assignment, between the assignee and assignor of a promissory note, is *prima facie*

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the amount of the note; and, therefore, the amount of the note, with interest, is *prima facie* the measure of the assignee's recovery, in his suit against the assignor. If the note was assigned for a sum less than the face of the note, and the assignor seeks to limit the amount of the assignee's recovery on the contract of assignment, to the sum paid for the note by the assignee, with interest, it devolves on the assignor to show, if he can, that the actual consideration of the contract of assignment was less, and how much less, than the face of the note. In such case, the sum actually paid the assignor for his transfer of the note, if he can show it, with interest thereon, is the measure of the assignee's recovery, in his suit against the assignor. *Youse v. McCreary*, 2 Blackf. 243; *Bozell v. Hauser*, 9 Ind. 522; *Lee v. Pile*, 37 Ind. 107.

The first objection to the first paragraph of complaint, in this case, discussed by the appellants' counsel, is that it contains no sufficient averment of the breach of the contract of assignment made by the decedent, Thomas Huston, or of his failure, neglect or refusal to repay the consideration of such contract with interest, or that the note in suit remained unpaid. This objection, we think, is not well taken. The first paragraph is simply a claim against a decedent's estate; and, under section 62 of the act of June 17th, 1852, providing for the settlement of decedents' estates, in force at the time, the appellee was only required to file "a succinct statement of the nature and amount" of its claim against the estate of the appellants' intestate. Sec. 2310, R. S. 1881. It has often been held by this court that the statute quoted "does not require a regular complaint under the ordinary rules of pleading, but merely a succinct statement of the claim, which, it seems to us, will be sufficient when it apprises the defendant of the nature of the claim, of the amount demanded, and shows enough to bar another action for the same demand." *Hannum v. Curtis*, 13 Ind. 206. *Ginn v. Collins*, 43 Ind. 271; *Post v. Pedrick*, 52 Ind. 490. The statute does not require the claimant to aver in his complaint that his claim remained

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unpaid ; but the act then in force did require the claimant to attach to the claim his affidavit, "to the effect that the same is justly due and wholly unpaid." 2 R. S. 1876, p. 515, *note c*, sec. 5 ; sec. 2310, R. S. 1881. It will be seen, we think, from the summary heretofore given of the first paragraph of the appellee's claim, that it was sufficient to apprise the appellants of the nature of the claim, and of the amount demanded, and to bar another suit for the same cause of action.

Appellants' counsel also claims, that the first paragraph of the claim was insufficient, on the demurrer thereto, because it contained no averment of any diligence used against Eliza M. Morton, one of the makers of the note. Counsel says: "The only excuse given for such want of diligence is, that she was a married woman ; but this is no valid excuse." The note assigned by appellants' intestate was the joint and several note of William S. T. Morton and Eliza M. Morton. The appellee's cause of action against the estate of Thomas Huston, deceased, was founded upon the decedent's assignment by endorsement of the note ; but that assignment or endorsement of the note, of itself, was not sufficient to constitute *prima facie* a claim against the decedent's estate. Without the existence of other facts, it is clear that the assignment of the note would not and did not subject the assignor, or his estate, to any liability on account of such note. While it is true, as already stated, that the ordinary rules of pleading are not applicable in all their strictness to the statement of a claim against a decedent's estate, yet it is equally true, we think, that the claimant should allege in his complaint, or the statement of his claim, all the facts necessary to constitute *prima facie* a cause of action in his favor against such estate.

In the case at bar, it was incumbent on the appellee, as it seems to us, that it should state in the first paragraph of its claim all such facts as were necessary to show *prima facie* that the estate of Thomas Huston, deceased, was liable to the appellee on and by reason of the decedent's assignment of the note. To this end, it was necessary that the appellee should

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allege in its claim such facts as would show either the use of due diligence in the premises against the makers of the note, or a sufficient excuse for its failure to use such diligence. It was not attempted to be shown, in the first paragraph of appellee's claim, that due diligence had been used against the makers of the note therein described, or either of them; but the appellee endeavored to show a valid excuse for its non-exercise of such diligence, as to each of the makers of the note. As to Eliza M. Morton, one of the makers of the note, the only reason assigned by appellee for its failure to use due diligence in the premises was that she was a married woman. Did the conceded fact, that Eliza M. Morton was a married woman at the time she executed the note, excuse the appellee from bringing suit against her on the note, before it could have an action against its immediate or remote assignor on the contract of assignment? This question is not free from difficulty, but, we think, it ought to be and must be answered in the affirmative.

It is true, as the appellants' counsel says, that if Eliza M. Morton had been sued on the note, and had not pleaded her coverture in bar of the action, a valid judgment might and would have been rendered against her for the amount due on the note, which could have been enforced by the seizure and sale of her property. After judgment had been rendered against her, she could not have used her coverture to prevent or defeat its collection. *Elson v. O'Dowd*, 40 Ind. 300; *Landers v. Douglas*, 46 Ind. 522; *Long v. Dixon*, 55 Ind. 352. It is true, also, that, if she had been sued on the note, she alone could have pleaded her coverture as a defence to the suit, for the defence of coverture is strictly personal, and it would have been optional with her whether or not she would have resorted to such defence. *Ætna Insurance Co. v. Baker*, 71 Ind. 102.

But it does not follow, we think, that the appellee was required, in the exercise of due diligence in the premises, to bring an action against Eliza M. Morton upon her note,

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- which, by reason of her coverture, was invalid and of no binding force as to her. The contract of the appellants' intestate, as the assignor of the note, as we have seen, was a warranty that the makers, Eliza M. as well as William S. T. Morton, were liable on the note. But as Eliza M. Morton, by reason of her coverture, was never liable on the note, the contract of the assignor, as to her, was broken as soon as it was entered into.

As to William S. T. Morton, the other maker of the note, it was alleged in the first paragraph of the complaint, that the assignees of the note did not bring suit against him thereon, at its maturity or afterwards, up to the time of his death, nor proceed against his estate afterwards, for the reason that the assignor, Huston, requested them not to do so, and that time should be given the said maker to pay the note, without suit. This request of the assignor, Thomas Huston, was a reasonable and valid excuse, we think, for the failure to use due diligence in the premises against William S. T. Morton, one of the makers of the note, or against his estate. *Sims v. Parks*, 32 Ind. 363; *Lowther v. Share*, 44 Ind. 390; *Davis v. Leitzman*, 70 Ind. 275. It may have been that the assignor of the note limited his request, that the assignee would not bring suit thereon, as against William S. T. Morton only, upon the theory that the other maker of the note, by reason of her coverture, was not bound thereby nor liable thereon; or it may have been, that the request was so pleaded by the appellee upon the same theory. We are of the opinion, however, that where the assignee of the joint and several note of two or more makers sues his immediate or remote endorser, and sets up an excuse or excuses for his failure to use due diligence against such makers, the excuse or excuses must be sufficient as to each and all of the makers, or the complaint or paragraph thereof will be bad, on a demurrer thereto for the want of facts. The demurrer was properly overruled.

In the second paragraph of its claim or complaint, the appellee sued upon an assignment by endorsement of the individual note of William S. T. Morton for the sum of \$136.76,

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dated February 3d, 1875, and payable one day after date to the order of Thomas Huston, the appellants' intestate. It was alleged that Huston endorsed the note to J. W. Swafford, and that Swafford endorsed the same to the appellee. The note was not payable at a bank in this State, and, therefore, its negotiability and the rights and liabilities of the assignee and assignor thereof were governed and controlled by the statute of this State, and not by the law merchant. This paragraph contained substantially the same averments as the first paragraph of the claim, except such as related to Eliza M. Morton. It was not claimed in the second paragraph that the assignee of the note therein described had used due diligence in the premises against the sole maker thereof, William S. T. Morton, or against his estate. But the appellee set up substantially the same excuse in this as in the first paragraph, for the failure to use due diligence against the maker of the note. The facts stated in this second paragraph were sufficient, we think, to constitute *prima facie* a claim against the estate of the appellants' intestate, and the demurrer thereto was correctly overruled.

The next error complained of, in argument by the appellants' counsel, is the decision of the circuit court in overruling the motion for a new trial. The causes assigned for such new trial were, that the finding of the court was not sustained by sufficient evidence and was contrary to law, that the damages assessed were excessive, and that the court erred in its assessment of the amount of appellee's recovery. The evidence is in the record by a proper bill of exceptions. There was no evidence that Eliza M. Morton, one of the makers of the note described in the first paragraph of the claim, was a married woman when she executed the note, or at any other time. Nor was there any evidence, introduced on the trial, which tended to prove the excuse alleged for the failure to use due diligence against the makers of the notes, namely, that the appellants' intestate, the assignor of such notes, had requested the assignee thereof not to bring suit thereon against

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William S. T. Morton, in his lifetime, or after his death, against his estate. These were material facts, in each paragraph of appellee's complaint, and, if they had not been alleged, neither paragraph would have stated *prima facie* a claim against the estate of appellants' intestate. The finding of the court upon the appellee's causes of action was not sustained by sufficient evidence; and for this cause the court clearly erred, we think, in overruling appellants' motion for a new trial.

Besides, in the fourth paragraph of their answer, the appellants alleged, by way of set-off, that before their intestate had any notice of the alleged transfer of the notes, in the complaint described, by the said Swafford, to the appellee, to wit, on the 16th day of December, 1876, the said Swafford, by his note, a copy of which was therewith filed, promised to pay said Thomas Huston, one day after date, the sum of \$2,400, with ten per cent. interest after maturity, and five per cent. attorney's fees, which note was due and wholly unpaid. Wherefore, etc. To this paragraph of answer, the appellee replied by a general denial, and by a plea of payment. Upon these issues, the appellants gave in evidence the note pleaded as a set-off, and the appellee offered no evidence whatever.

The appellants' intestate was the remote endorser of the notes described in appellee's complaint, as between him and the appellee; and Swafford was the immediate assignee of the said intestate. In section 5504, R. S. 1881, it was and is provided that, "in suit against a remote endorser, he shall have any defence which he might have had in a suit brought by his immediate assignee." If suit had been brought by Swafford, the immediate assignee of appellants' intestate, against the estate of the intestate, on his contracts of assignment, it can not be questioned but that the appellants, as the administrators of the intestate's estate, might have used Swafford's note, described in the fourth paragraph of their answer, as a set-off in such suit. Under the statutory provision last quoted, the appellants, as the representatives of the remote endorser, were expressly authorized, as it seems to us, to avail

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themselves in this suit by the appellee of the same defence of set-off which they might have interposed in a suit brought by Swafford, the immediate assignee of their intestate, against the estate of their intestate. When the appellants had given the Swafford note in evidence, it was not incumbent on them to prove that, at the time Swafford executed the note to their intestate, the latter had no notice of the former's alleged transfer to appellee of the notes described in the complaint, although the fact was averred in their answer of set-off. "The averment is a negative one, not perhaps in the power of the defendant to prove, and therefore the *onus* of proving notice is thrown on the plaintiff, if he would defeat the set-off." *Sayres v. Linkhart*, 25 Ind. 145. *Rawlings v. Fisher*, 24 Ind. 52. In a suit by the assignee of a note against his remote endorser, the defendant, in pleading a set-off against his immediate assignee, must aver that he acquired such set-off before he had notice of the assignment to the plaintiff; but, in proof, the burden of showing notice to the defendant of such assignment rests on the plaintiff. *Hayes v. Fitch*, 47 Ind. 21.

Upon the evidence, therefore, we are of opinion that the appellants were entitled to a set-off of the amount due on the Swafford note against the sum found due on the notes described in appellee's claim. As the trial court did not give the appellants any benefit or credit, on account of their set-off, it follows, of course, that the damages were excessive, and the court erred in assessing the amount of appellee's recovery. For these causes, the appellants' motion for a new trial ought to have been sustained.

Some other points have been discussed by counsel, but, as they are not likely to arise again on a new trial of this cause, we need not extend this opinion in their consideration or decision.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

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No. 9221.

TRENTMAN ET AL. v. WILEY ET AL.

ATTACHMENT.—*Suit on Bond.—Complaint.*—Where defendants in an attachment proceeding succeed, and bring an action upon the bond to recover such damages as they sustained by the seizure and sale of their goods by a writ issued therein, it is not necessary to allege in the complaint that an affidavit was filed, or that the writ was delivered to the proper officer, or that the goods were sold by any person having authority.

SAME.—*Answer.—Sale of Perishable Goods.—Judgment Res Adjudicata.*—An answer in such action, that the goods were sold as perishable property, under an order of the court, made without objection, constitutes no defence, and an averment that the writ was rightfully issued adds nothing to the answer, as the judgment in the attachment proceedings concludes the defendant upon such question.

SAME.—*Damages.*—In such action the plaintiffs are entitled to such damages as they sustained, although it is not shown that the judgment in the attachment proceedings was upon the merits; and an answer which avers no fact in bar of the action is insufficient on demurrer.

SAME.—*Measure of Damages.*—The price for which the property was sold by the sheriff, under the order of the court, as perishable property, was not the measure of damages in a suit upon the attachment bond.

SAME.—*Instruction.*—An instruction in such action, that if a part of the attached property was left with the plaintiffs, the cash value of the residue was the measure of damages, was properly refused, as it precluded a recovery for such expenses as were incurred in defending the suit, and such sums in addition in the nature of interest as will compensate the party for his loss; and an instruction, which directs the jury to allow interest upon the value of the property taken and the amount of expenses incurred from the time the writ issues, in addition to such sums, is erroneous, unless the property was then taken and the expenses then incurred.

SAME.—*Mitigation of Damages.*—Where the money arising from the sale of perishable property in attachment proceedings is brought into court, and, after the proceedings are defeated, the court, without objection, orders the money paid to the defendants, the same, in a suit upon the bond, will be considered, in mitigation of damages, as the property of the defendants.

SAME.—*Creditor.—Party.—Lien.—Judgment.*—A creditor, who files his claim under an attachment proceeding, becomes a party thereto and is concluded by the judgment, and, if the defendant succeeds, such creditor acquires no lien upon the property, though his claim is allowed.

PRACTICE.—*Instruction.—Interrogatories.*—An oral statement by the judge

85	33
148	186
149	39
152	626
85	33
161	382
85	33
168	476

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to the jury, directing them to answer certain interrogatories, is not an instruction within the meaning of the law, and there is no error in making it after a request to instruct in writing.

SAME.—The refusal of the court to give an instruction to the jury applicable to facts which the jury find do not exist is not error.

SAME.—*Submission of Interrogatories.*—It is not error to refuse to submit to the jury an interrogatory as to a question of fact not involved in the issues, or as to a question of law.

SAME.—*Verdict.*—A motion for judgment upon the answers of the jury to interrogatories can not be sustained where the facts found do not control the general verdict.

SAME.—*Judgment.—Costs.—New Trial.*—The rendition of a judgment for costs, without relief from valuation laws, if erroneous, is not cause for a new trial.

SAME.—*Excessive Damages.—Supreme Court.*—Where the damages assessed are excessive, the judgment will not be reversed for such cause if the successful party will remit the excess.

From the Marshall Circuit Court.

L. M. Ninde and T. E. Ellison, for appellants.

BEST, C.—The appellees sued the appellants upon an undertaking in attachment, alleging in their complaint, in substance, that appellants executed said bond, caused a writ of attachment to issue thereon, by virtue of which a stock of goods of the value of \$2,000, belonging to the appellees, was attached, sold and otherwise disposed of, whereby the same was wholly lost to the appellees; that they were put to \$300 expense in defending said attachment proceedings, and that a judgment was finally rendered for them therein.

A demurrer to the complaint by appellants for the want of facts was overruled, and an answer of five paragraphs was filed. A demurrer was sustained to the second, third and fifth, and a reply was filed to the fourth paragraph of the answer.

The issues thus formed were tried by a jury, and a verdict, with answers to interrogatories, was returned for \$900. The appellants moved for a new trial and for judgment upon the answers to interrogatories. These motions were overruled, and final judgment rendered upon the verdict.

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These various rulings are assigned as error, and will be considered in their order.

The objections urged to the complaint are, that there is no averment that an affidavit was filed in the attachment proceedings; there is none that the writ was delivered to the proper officer; nor is there any that the goods were sold by any person having authority.

These averments were unnecessary. The averment is that appellants caused the goods to be seized, and this was sufficient to show that they were liable for the loss of them, if the proceedings were wrongful. Nor was it necessary to allege that an affidavit had been filed in the attachment proceeding. The appellees were not required to prove that fact, nor would the want of one be any defence, and hence an averment upon that subject was wholly unnecessary. The complaint was sufficient, and the demurrer properly overruled.

The second paragraph of the answer averred that after the goods were attached the sheriff applied to the court for an order to sell them as perishable property; that the court, without objection from the appellees, ordered them sold, and the sheriff, in pursuance of such order, sold them for \$110.95; that the appellees have never demanded the money of the sheriff, and that said proceedings were not wrongful.

The judgment in the attachment proceedings against the appellants concludes them upon the question as to whether the writ was rightfully or wrongfully issued, and hence the last averment in this paragraph of the answer adds nothing to it. The other facts constituted no defence. The averment that the order was made without objection is not equivalent to an averment that the sale of the appellee's goods was made with their consent. The goods having been wrongfully taken, the sale of them as perishable property, in pursuance of the statute, in no manner exonerated the appellants from liability for such damages as their wrong occasioned. The facts alleged constituted no defence, and the demurrer was properly sustained.

The fifth paragraph of the answer alleged, in substance,

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that the appellees had purchased said stock of goods of the appellant Trentman, and, at the time said attachment proceedings were instituted, the appellees were selling said goods for the purpose of cheating and defrauding said appellant and their other creditors, and that, by reason of such facts, said proceedings were not wrongfully, but rightfully, instituted.

What we said in disposing of the latter part of the second paragraph of the answer disposes of this paragraph. The appellants can not, in this suit, allege that the writ of attachment was rightfully issued. That fact was adjudged against them in the other suit. They insist, however, that it does not appear from the complaint that the judgment was upon the merits, and, in such case, they may show that the attachment was rightfully issued. We think it does so appear, but if it did not the appellees would, nevertheless, be entitled to such damages as they had sustained, and, as this paragraph alleged no fact in bar of the action, it was insufficient. The demurrer was properly sustained.

This brings us to the motion for a new trial. It embraced many reasons. Those that are noticed in appellants' brief will alone be considered.

The first is that the court erred in instructing the jury orally, after it had been requested at the proper time to instruct in writing. Such a request was made, and, after the written instructions were read to the jury, the court said to them that the defendants had furnished certain interrogatories which they were required to answer and return with their general verdict; that he, the judge, had drawn pencil marks across some of them, and that they need not answer them; that he had drawn a mark across one numbered 45, by mistake, and that they should answer that one; that plaintiffs' counsel have noted their objections to these interrogatories, but that they should not regard such objections.

These statements were not instructions, within the meaning of the law. *McCallister v. Mount*, 73 Ind. 559.

The appellants requested the court to charge the jury that

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if the sheriff obtained an order to sell the property attached as perishable property, without objection from the appellees, and in pursuance of such order sold it, the price for which it sold was the measure of damages.

This instruction was properly refused. The appellees were not limited in their recovery to the amount for which the property sold. *Stott v. Harrison*, 73 Ind. 17; *Smith v. Zent*, 83 Ind. 86.

The appellants asked the court to instruct the jury that if they found that the amount for which the property sold had been applied upon a judgment in favor of H. J. Trentman & Bro., against the appellees, such fact should be considered in mitigation of damages.

The jury found, in answer to an interrogatory, that the money arising from the sale was not so applied, and, therefore, the refusal of the court to give this instruction, if erroneous, was harmless. *Moore v. Lynn*, 79 Ind. 299.

The appellants also asked the court to charge the jury that if they found that \$391.90 was the fair cash value of that portion of the property sold to one Helmer and Martin & Co., and that the residue of the property attached was left with the appellees, the sum for which such portion sold was the proper measure of damages.

This instruction was properly refused. It ignored one important element of damages, and that was the right of the appellees to recover in such action such sum as would compensate them for the expenses incurred in defending the suit in attachment. *Drake Attachment*, section 175.

The appellants also asked the court to instruct the jury that if they found that H. J. Trentman & Bro. had filed a claim under the attachment proceedings of the appellant Trentman, and that a judgment was rendered thereon for \$137, without any denial of the affidavit filed therewith, said H. J. Trentman & Bro. would hold a lien upon the property attached, by virtue of the writ of attachment, and

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the appellees would not be entitled to claim said property or its value in this suit.

This instruction was also properly refused. When a creditor files a claim, under an attachment proceeding, he becomes a party to such proceeding, and when such proceeding is tried and determined the judgment concludes all persons who are parties. The statute does not contemplate a separate trial of such proceeding by each creditor who becomes a party by filing his claim, and if a creditor's claim is allowed, but the proceedings in attachment are defeated, as was done in this case, such creditor has no lien or claim upon such property by virtue of such proceeding. *Lexington, etc., R. R. Co. v. Ford Plate Glass Co.*, 84 Ind. 516.

The appellants also requested the court to instruct the jury that if they should find that the appellant Trentman, since the commencement of the trial, had released a portion of the goods attached to the appellees, this fact should be considered in estimating the damages sustained.

The jury found that no goods had been released, and this fact renders the ruling upon this instruction harmless.

The appellants also complain of an instruction given by the court, as to the measure of damages, which will be considered hereafter.

The fourth paragraph of the answer set up a judgment in favor of the appellant Trentman against the appellees as a set-off, and the thirteenth and fourteenth interrogatories asked the jury to state the amount of costs recovered in such action. These interrogatories the court refused to submit to the jury, and of this the appellants complain. There was no averment in the complaint, nor proof upon the trial, of the amount of costs recovered, and, therefore, there was no error in this ruling.

Interrogatories numbered from 19 to 28, inclusive, were intended to elicit the facts concerning the claim of H. J. Trentman & Bro., and its allowance by the court. These the court refused to submit to the jury, and this ruling was proper, for

the reason heretofore given why the allowance of this claim did not affect the rights of the parties to this action.

The question propounded by the sixty-seventh and sixty-eighth interrogatories was as to whom the money deposited with the clerk belonged; and these the court refused to submit to the jury. This was right. The enquiry was a question of law and not of fact.

The motion of appellants for judgment upon the answers of the jury to interrogatories can not be sustained. No fact was found by them that controls the general verdict and entitles the appellants to judgment.

The court, over appellants' objection, rendered a judgment for the costs, without relief from valuation or appraisement laws, and this was assigned as a cause for a new trial. Such order is not ground for a new trial, and, as it was not assigned as error, no question arises upon the ruling.

The appellants also insist that the damages assessed were excessive, and that the court misdirected the jury as to the proper measure of damages. Upon this question the court instructed the jury as follows: "If you believe from the evidence that the plaintiffs are entitled to recover anything on account of expenses and attorney fees incurred by them in defending said attachment, the amount thereof, added to the damages you find for the attaching of their property, would constitute the amount you would be entitled to fix as the damages for the issuing, service and defence of said attachment suit and proceeding, to which should be added interest at six per cent. per annum on the full amount of damages, from the commencement of the attachment to this time."

This instruction means, as we suppose, that the amount of expenses incurred in the defence of the attachment suit is to be added to the damages caused by the attachment of the property, and interest at six per cent. from the time the writ of attachment was issued till the time of trial was to be added to the sum total, as the measure of damages.

This is not an accurate statement of the law. Where none

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of the property attached is restored to the attachment defendant, upon a failure of the attachment proceedings, but the same is wholly lost to him, the value of the property, with interest thereon from the time it was taken, and such expenses as were necessarily incurred in the defence of such proceeding, with interest thereon from the time such expenses were incurred, is the measure of damages. Compensation for the loss is the rule in such cases, and this is awarded by allowing the party the value of his property, the expenses incurred, and such sum in addition, in the nature of interest, as will compensate him for his loss. *Beals v. Guernsey*, 8 Johns. 446 (5 Am. Dec. 348); *Kennedy v. Whitwell*, 4 Pick. 466; Cooley Torts, page 457, and authorities cited.

The party, however, in the absence of circumstances entitling him to exemplary damages, is not entitled to anything more than compensation, and, therefore, is not entitled to interest upon the value of the property attached, and expenses incurred from the time the attachment was commenced, unless the property was then seized and the expenses were then incurred. The expenses in this case were not incurred at the time the attachment was commenced; and, as the instruction in question directed the jury to assess interest as damages upon expenses before they were incurred, it was, in this respect, erroneous.

The damages assessed were also excessive if the value of the property, and the amount of expenses incurred, as found by the jury in answer to interrogatories, may be relied upon in determining such question. The property was attached on the 28th day of September, 1876. Shortly thereafter the sheriff sold it as perishable property for \$110.95, \$71.40 of which, the net proceeds of said sale, was paid into court; and, on the 6th day of July, 1878, when the proceedings in attachment were adjudged against appellants, this sum was ordered paid to the appellees. This was not, however, done, and this sum remained in the hands of the clerk on the 29th day of October, 1880, when the judgment in this cause was rendered. Whether

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this money, in the absence of the order made to pay it to the appellees, would be treated as their money, or whether they could recover full damages, as upon a complete conversion of their property, it is not necessary to determine, as we are of opinion, that, after the order was made, to which no objection was interposed, the money must be treated as belonging to the appellees, and their damages assessed accordingly. If this were not so, after judgment and satisfaction for full damages, this order would entitle the appellees to this money, which would, in the absence of such order, under such circumstances, belong to the appellants. The fourth paragraph of the answer, as before stated, was a set-off by Trentman, who was principal in the bond, and the jury found there was due thereon \$861.38. They also found that the value of the property attached was \$1,250, and that the expenses incurred amounted to \$170.48. If interest at six per cent. upon these last two sums, from the time the writ of attachment was issued until the judgment was rendered, is added, and from the aggregate the amount of money in the clerk's hands and the amount of the set-off are deducted, it will be found that the verdict is at least \$65 in excess of the damages sustained. In addition to this it appears that the expenses were not incurred when the attachment was issued, and that the excess is, therefore, greater than the sum above named. It, however, does appear that all expenses were incurred before the 28th of June, 1878, when the attachment suit was tried, and if interest is allowed upon the amount of expenses incurred from this time, and upon the value of the property from the time the attachment issued, at which time the property was taken, and from the sum total of these several amounts the amount of the appellant Trentman's judgment and the amount of money in the hands of the clerk are deducted, it will be found that the sum assessed is \$82 in excess of the damages sustained. This amount may be remitted, and the errors in giving the instruction and in making the assessment may thus be rendered harmless, without a reversal of the judgment.

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We have now considered all the questions in the record, and are of opinion that if the appellees will, within sixty days, remit \$82 of the judgment, as of its date, the same should be affirmed for the residue; otherwise reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that if the appellees will, within sixty days from this time, remit \$82 of the judgment, as of its date, the same will be affirmed for the residue, at the appellees' costs in this court. Otherwise, reversed, at the appellees' costs.

No. 9209.

WILBER, ADMINISTRATOR, v. BUCHANAN ET AL.

MORTGAGE.—*Consideration.*—*Vendor and Purchaser.*—*Partial Failure of Title.*—*Eviction.*—*Promissory Note.*—*Decedents' Estates.*—*Assignor and Assignee.*—*Priority of Liens.*—*Partition.*—Suit by an administrator to foreclose a mortgage for instalments of purchase-money of lands first maturing—several notes having been given. The widow filed a cross complaint for foreclosure of the same mortgage as to notes for later instalments, which had been bequeathed to her by the will of the decedent, and to establish priority thereof over the notes held by the plaintiff. Answer by the mortgagor to both, that the consideration had failed in part, in this, that the decedent had conveyed the land to him by deed, with covenants, for \$5,000; that as to one-fifth, undivided, he had no title, the title being in H., which was so adjudged in a suit by H. for partition.

Held, that the answer was good; showing a sufficient defence as to one-fifth of the purchase-money.

Held, also, that the judgment of partition in favor of H. was a constructive eviction.

Held, also, that while a defect of title can not be pleaded in bar of the foreclosure of a mortgage for purchase-money, it can be as a failure of the consideration of the notes given for the title, which would incidentally defeat the foreclosure.

Held, also, that, though the notes held by the widow were last to mature, she was entitled to priority, as an assignee, and the failure of consideration must first fall upon the notes held by the administrator.

From the Ohio Circuit Court.

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J. B. Coles and *D. S. Wilber*, for appellant.

A. C. Downey, *G. E. Downey* and *S. H. Stewart*, for appellees.

FRANKLIN, C.—This action was brought by the appellant to collect three notes given to the decedent in his lifetime, and to foreclose a mortgage given to secure their payment with other notes, two of which were paid before the death of the testator. The last two notes secured by the mortgage had been delivered by the former administrator to the surviving widow, Annetta Buchanan (now Hays), under the provisions of the decedent's will. The widow, on her application, was made a party to the action to foreclose the mortgage.

The defendants William S. Buchanan and wife answered in two paragraphs:

1st. A plea of payment. The 2d set up a partial failure of consideration, for the reason that the decedent had no title to one-fifth of the land conveyed for \$5,000, and for which the notes were given in part; and that Cornelia Hubbart and Margaret Riggs, in a partition proceeding, had been decreed by the Dearborn Circuit Court, on a change of venue, to hold a paramount title to the undivided one-fifth of the land, and that their title thereto be forever quieted; and praying for a deduction of one-fifth of the purchase-price, to wit, \$1,000, from any judgment that might be rendered in the cause; that one-fifth of said land is held by a paramount title in said other persons.

Reply in denial, and that the defendants were still in the possession of the land, and also alleging that the defendants got a reduction of \$1,669 from the purchase-price of the land at the time of the sale, to offset any defect of title.

Appellee Hays filed a cross complaint asking to have a judgment and foreclosure of the mortgage as to her notes.

The plaintiff and the defendants separately answered her cross complaint; the defendants by setting up the same matters as stated in defendants' second paragraph of answer to

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plaintiff's complaint, and the plaintiff asked that as his notes were of prior maturity, if any deduction was made on account of defect of title, it should be made from the notes held by Mrs. Hays, and not from the ones held by him. Mrs. Hays replied to this answer by alleging that the said last two notes had been transferred to her by the former administrator in good faith as a legacy devised to her and specified in the will of her deceased husband, and as the former notes sued on yet belong to the estate, if any deduction was made, it should be from them, and not from her notes. A demurrer was overruled to the second paragraph of defendants' answer, which presents the only question upon the pleadings. A trial was had by the court, which found that the defendants were entitled to a deduction on account of defect of title, and that it should be made from the plaintiff's notes.

Over a motion for a new trial, judgment was rendered for the plaintiff for a balance of his notes in the sum of \$59.75, and for Mrs. Hays in the sum of \$713.62, and for a foreclosure of the mortgage as to both sums.

The errors assigned in this court are :

1st. Overruling the demurrer to the second paragraph of the defendants' answer.

2d. Overruling the demurrer to the cross complaint of Annetta J. Hays.

3d. Overruling the motion for a new trial.

The second error assigned is not referred to in appellants' brief, and is therefore waived.

Appellant, in his brief, presents three questions, arising under the first and third errors assigned, for the consideration of this court :

1st. As to whether the second paragraph of defendants' answer states facts sufficient to constitute a defence to any part of the plaintiff's claim?

2d. If the paragraph is good, are the defendants entitled to more than nominal damages thereon?

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3d. Can the deduction, if any, be taken from the plaintiff's claim?

The first objection to the second paragraph of the answer is, that it does not show an ouster of the defendants' possession; and appellant insists that, as long as the defendants remained in possession, they could not set up a defect of title as a defence to the payment of the notes given for the purchase-money, and a number of authorities are referred to in support thereof.

This is no doubt the general rule, based upon the fact that although the title is defective, still, under the statute of limitations, possession may be retained until it ripens into a good title. But this doctrine can not apply where the land is held by tenants in common; unless there is a constructive or actual ouster, the possession of one is the possession of all; neither has the right to the exclusive possession of any specific part thereof, and can not turn the other out except upon partition, and having some specific part assigned.

In the case at bar, the judgment of the Dearborn Circuit Court was, that certain other parties were the owners of an undivided one-fifth of the land; that their title thereto be forever quieted; and a perpetual injunction was granted against interfering with their title, and that they have partition thereof accordingly.

The defendants had a right to yield to the paramount title thus judicially declared without waiting for an actual ouster from any specific portion of the land that should be assigned to defendants in the partition. They could not do otherwise without yielding the possession of the undivided part to which they held a good title.

It is further objected that this paragraph of the answer does not allege fraud, or a breach of the warranty of the deed.

It is true that it does not allege fraud, nor is it necessary that it should; but it does allege a breach of the warranty of the deed, and makes the deed a part of the paragraph, claim-

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ing that the breach has worked a partial failure of the consideration of the notes.

It is further objected, that the mortgagor can not plead a defect in the title to the mortgaged premises as a defence to the foreclosure of the mortgage. While this is true, yet he can plead a defect or want of title as a failure of the consideration of the notes given for the title; and this is all we understand this paragraph of the answer to attempt to plead. True, if the failure or want of title destroyed the whole consideration of the notes, it would defeat a foreclosure of the mortgage, for the reason that there would be no debt to be paid by a foreclosure of the mortgage, and it would cease to secure anything; but if the breach only worked a partial failure of the consideration of the notes, the mortgage could be foreclosed on the whole land for the payment of the balance, notwithstanding the partial failure of consideration, as was done in this case. We think the second paragraph of defendants' answer stated facts sufficient to constitute a good plea of partial failure of consideration.

The other two questions arise under the reasons stated for a new trial, and have reference to the sufficiency of the evidence to support the finding. There are a number of reasons stated in the motion for a new trial that are not referred to in appellant's brief. They are, therefore, waived, and need not be here stated.

It is insisted that, under the evidence, no eviction was proved, and that nothing more than nominal damages could be allowed. Eviction does not necessarily require an actual ouster. There may be a constructive eviction, and what, in equity, is equivalent to an ouster. *Tufts v. Adams*, 8 Pick. 547; *Rawle Covenants of Title*, 4th ed., pp. 688, 689, note 1.

A decree of foreclosure and sale is equivalent to an eviction; the holder is compelled to buy in the paramount title or suffer an actual ouster of his possession. *Hunt v. Amidon*, 4 Hill, 345; *Cowdrey v. Coit*, 44 N. Y. 382 (4 Am. R. 690);

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Hannah v. Henderson, 4 Ind. 174; *Black v. Duncan*, 60 Ind. 522, p. 530.

The assertion and establishment of a paramount title in a tenant in common to a part of the premises are equivalent to an eviction to that extent, for the reason that the possession of one tenant in common is the possession of all, and the co-tenant, establishing a paramount title under the assertion of his rights, is thereby invested with the possession of that undivided part, without an actual ouster of his co-tenant. *Seabrell v. Hughes*, 72 Ind. 186; *Wilson v. Peelle*, 78 Ind. 384.

In the latter case it was held that a judgment in a partition proceeding, where the question of title was in issue, is competent to prove the eviction of the covenantee, but not to prove the paramount title by which he was evicted, unless he was made a party to the partition proceedings, and that the possession of one joint-tenant is the possession of both. The title of neither is superior to the other.

In the case at bar the record of the partition proceedings in the Dearborn Circuit Court was given in evidence, which contains a decree that Hubbart and Riggs are the owners of the undivided one-fifth of the premises (describing them); that their title thereto be forever quieted. A perpetual injunction is granted against in any manner interfering with their title, partition thereof is ordered, and commissioners appointed to make it; but the record does not show that partition has ever been made.

Appellant's decedent was not made a party to these partition proceedings, but had knowledge of their pendency. His deposition was read on the trial of the cause, and also on the trial of the present case. There was other evidence given on the trial of this case tending strongly to show a paramount title in Hubbart and Riggs to an undivided one-fifth of the premises, among which was the fact that appellant's decedent had retained a part of the purchase-money (\$100), which he had agreed to pay for the land, for the purpose of offsetting any claim of title that might otherwise be set up to it.

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We think the evidence tended clearly to support the finding of the court, that there had been an eviction under a paramount title as to one-fifth of the premises, and that the defendants were entitled to a deduction of a *pro rata* share, from the consideration which they had agreed to pay, and were not restricted to mere nominal damages.

The last question presented is, From which of the notes should the deduction be made? Mrs. Hays held the last two notes; appellant held the previous three notes.

In the case of *Doss v. Ditmars*, 70 Ind. 451, p. 458, it was decided that "Under the law of this State, as settled by numerous decisions of this court, a mortgage given to secure two or more notes, maturing at different dates and assigned to different holders, must be considered as if there were as many different successive mortgages as there were of such notes, and the holder of the note first due will have priority, and the holder of the other note or notes will come in in the same order in which such note or notes matured." See authorities therein cited. But if the "mortgage is given to secure separate obligations to different parties, maturing at different times, such a mortgage is in all essential respects equivalent to the simultaneous giving of separate mortgages to secure such obligations;" and no priority exists. *Shaw v. Newsom*, 78 Ind. 335. But an endorsee of a part of the notes secured by a mortgage is entitled to payment in preference to the mortgagee. . 2 Jones Mortgages, section 1701, and the authorities therein cited.

In the case at bar, appellant's decedent retained three of the notes first maturing, and by his will specifically devised to his wife the last two maturing notes, which were delivered to her and a receipt taken therefor in discharge of the legacy by the former administrator with the will annexed.

This gives her a preference in payment over the notes retained and undisposed of by appellant's decedent, the collection of which is now sought to be enforced by appellant.

No question is made in the pleadings or evidence as to any

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necessity for the notes which are held by Mrs. Hays being used in the payment of the debts of the estate.

The will shows that the intention of the testator was to retain the three notes first maturing to be used in the settlement of his estate, and to dispose of the other two. As against the heirs, the widow is a good-faith owner and holder of these two notes; and equity requires that any partial failure of the consideration of the notes secured by the mortgage shall first be deducted from the notes retained by the mortgagee, and shall only affect the assignee to the extent of any deficiency in the amount of the notes retained, to cover the amount of the deduction to be made.

We think there was no error in the finding of the court that the deduction should be made from the notes held by appellant.

There was no error in overruling the motion for a new trial.

The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is in all things affirmed, with costs.

 No. 8944.

WHITEMAN v. HARRIMAN ET AL.

PRINCIPAL AND SURETY.—*Contribution.*—*Subrogation.*—*Mortgage.*—A. was indebted by promissory notes to a number of persons, on one of which B. and C. were his sureties, on several others B. only was surety, and on others D. only was surety. Afterwards A. made to B. and D. a chattel mortgage, to secure the payment of all his said debts, reserving the right to possess the property and to sell it, applying the proceeds in payment of said debts, which was done in part. C. was compelled to pay the demand on which he and B. were joint sureties. Suit by C. against B. and D. for the amount he had paid.

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Held, that the acceptance of the mortgage did not impose upon B. and D. any joint obligation as sureties upon all the debts mentioned in the mortgage.

Held, also, that the mortgage was a security for all said debts, *pro rata*, so that C., having paid the debt on which he and B. were co-sureties, became entitled to the share applicable to that demand.

Held, also, that B. was liable to C. for contribution, as a co-surety.

Held, also, that D. was not so liable to C., and, not having received more than his proper share of the mortgaged goods, was not liable at all to him.

HARMLESS ERROR.—There can be no available error in sustaining a demurrer to one paragraph of a complaint, where the plaintiff has the full benefit of the facts properly pleaded therein, under an issue formed on another paragraph.

From the Newton Circuit Court.

W. H. H. Graham and *S. P. Thompson*, for appellant.

J. T. Sanderson, for appellees.

BLACK, C.—On the 13th of July, 1876, one William H. Harrison, as principal, and George M. Harriman and Amos O. Whiteman as sureties, executed to the First National Bank of Watseka, Illinois, a promissory note for \$309.30, payable three months after date. Said Harriman was surety for said Harrison on a number of other notes, and one Bluford Light was Harrison's surety for certain other debts, but he was not a co-surety with Harriman or Whiteman for any debt. Harrison, Harriman and Light resided in Newton county, Indiana, and Whiteman resided in Illinois.

On the 17th of August, 1876, Harrison executed to Harriman and Light a mortgage upon certain personal property, being the mortgagor's interest in a paid-up lease of a certain farm for three years from the 1st of March, 1876, the crop on said farm, certain farm products, live-stock, agricultural implements, household furniture and utensils, and one note for ninety dollars; the condition of the mortgage being, "that whereas the said William H. Harrison is justly indebted to said George M. Harriman and Bluford Light, in the sums hereinafter named, as evidenced by certain promissory notes, which the said Harriman and Light have secured the payment of, to wit, one note of \$310, of June 13th, 1876,

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at the National Bank at Watseka, with interest thereon ; one note of \$340, of February 1st, to Joseph Law, and ten per cent. interest ; one note of \$218, of October 1st, 1875, to George M. Harriman, with ten per cent. interest ; one note of \$300, date about March 1st, 1874, to Thomas Askew, with seven per cent. ; one note of \$100, date about July 6th, 1874, to Aletho Crowl, with ten per cent. ; one note of \$55, date about November, 1875, to Samuel H. Benjamin ; one note of \$267.65, at the bank of Ade, McCray & Co., in Kentland, and about \$200, a balance due the estate of Benjamin Harrison, deceased ; amounting in all, with interest, to about \$2,000, all without any relief from valuation or appraisement laws ; it is agreed and understood by the parties hereto, that said William H. Harrison shall retain possession of said property hereby sold, until said notes and debts hereby secured become due ; the said Harrison shall have the right to sell and dispose of any part of said property, with the consent of said Harriman and Light, and apply the proceeds of such sale or sales to the payment of said notes ; and when said notes and debts have been paid in full, and said Harriman and Light released from said security, then this obligation to be void, otherwise to remain in full force and virtue in law ; the whole to be settled within two years from March 1st, 1877, and if not paid within that time the said Harriman and Light shall then have the right to take and keep possession of said property wherever it may be found, without any process of law, and the same shall become the absolute property of said George M. Harriman and Bluford Light ; and the said William H. Harrison hereby expressly agrees not to remove the said property from the place where it now is, without the consent of said Harriman and Light, and then to sell the same and apply the proceeds towards paying the debts as hereinbefore stated," etc.

There were various renewals of the note so made to said Watseka bank, and, a portion of it having been paid by said Harrison and Harriman, a final renewal was made November

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6th, 1878, by the execution to said bank of a note for \$250, due ninety days after date, by Harrison as principal and Harriman and Whiteman as sureties. Whiteman paid this note in full soon after its maturity, and it was thereupon surrendered to him by the payee, said bank. On the 4th of March, 1879, this action was brought by said Whiteman, the appellant, against said Harriman and Light, the appellees.

The complaint was in three paragraphs. The appellees demurred separately, for want of sufficient facts, to each paragraph of the complaint; and the demurrers were sustained to the first paragraph and overruled as to the other paragraphs. Appellees answered separately, by general denials. The cause was tried by a jury, who found for the appellant in the sum of \$128.43, against appellee Harriman, and found in favor of appellee Light. Appellant moved for a new trial; and the court offered to grant him a new trial as against Harriman, but not as against Light. Appellant having declined this offer, the court overruled his motion, and rendered judgment in accordance with the verdict.

Sustaining the demurrer to the first paragraph of the complaint, and overruling the motion for a new trial, are assigned as errors.

The first specification of the assignment of errors is not much pressed in argument; but we have examined the first paragraph of the complaint, and we think it showed a right of contribution against appellee Harriman, for it alleged his co-suretyship with appellant, the payment by appellant of the debt for which they were sureties, after its maturity, and the insolvency of Harrison, the principal. The paragraph also counted upon a promise and agreement of Harriman and Light, said to have been contained in a chattel mortgage, but the mortgage was not made part of this paragraph, which was, therefore, insufficient as to Light.

But appellant was not harmed by the ruling on the demurrer, for the same right of contribution against Harriman was shown in the third paragraph of the complaint, and there-

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under appellant had the benefit of his claim for contribution against Harriman as fully as he could have had it under the first paragraph.

The note first mentioned in the mortgage was the note first executed, as aforesaid, to the Watseka bank, on which Harriman and appellant were sureties. Harriman was also surety on all the other items of Harrison's indebtedness mentioned in the mortgage, except the note to Ade, McCray & Co., and the debt to the Harrison estate; and Light was surety only on said note to Ade, McCray & Co., and said indebtedness to the Harrison estate.

The mortgaged property was left in the possession of Harrison, as stipulated in the mortgage, and some of the debts were paid in full and some in part. About the 1st of February, 1879, Harrison removed from the State, without the knowledge of either of the appellees. Harriman and Light procured appraisers, who, appellant being present, appraised the mortgaged property left by Harrison upon his removal.

The second paragraph of the complaint was based upon a charge of negligence of the appellees in leaving the property in the possession of Harrison, and in permitting it to be wasted and destroyed.

Harrison had in the mortgage reserved the right to retain possession, and the appellees do not appear, from the evidence, to have been wanting in diligence in causing the application of the property to the payment of the debts secured thereby, as provided in the mortgage, or in preserving what Harrison left behind when he removed.

At the time of Harrison's removal there were unpaid by him debts mentioned in the mortgage, amounting to about \$963. Of this amount Light had paid on the note to Ade, McCray & Co., \$243. The indebtedness to the Harrison estate had been paid by Harrison. The property left by Harrison was worth about \$192. Light received of the property so left goods worth about \$49, the remainder being taken by Harriman.

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The third paragraph of the complaint, besides showing a cause of action against Harriman for contribution, charged Harriman and Light with having taken possession of the mortgaged property, and having appropriated it to their own use, and with failing to apply its value to the payment of the note paid by appellant.

Counsel for appellant insist that by the acceptance of said mortgage the appellees were jointly bound for the application of the mortgaged property to the debts mentioned in the mortgage.

Without determining whether or how far this question was involved in the issues tried, it may be said that, in giving this security to the appellees, Harrison reserved to himself the right of possession and of sale for the payment of the debts, and Light, who was not a surety for the indebtedness to the Watseka bank, or co-surety with appellant before the execution of the mortgage, did not become such by its acceptance; that it was a security to each of the mortgagees for his particular liabilities, and they did not, by acceptance of the mortgage, become jointly bound to all the creditors, whose claims were further secured by the mortgage, or become sureties for each other as to those claims. As to the remnant of the property abandoned to them, each mortgagee was interested in it in proportion to the unpaid portion of the debts on which he was liable as surety; and the unpaid creditors, for whom Harriman and Light respectively were sureties, were interested in such remnant as their respective sureties were interested, and in the proportion of their respective claims, and Whiteman, having paid one of those claims, was subrogated to the right of the creditor whose claim he had paid. See *Burnett v. Pratt*, 22 Pick. 556; *Constant v. Matteson*, 22 Ill. 546.

Light does not appear to have received more than his reasonable proportion of the goods. Appellant may have been entitled to recover a larger amount from Harriman than was awarded by the jury, and he assigned as one ground for a

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new trial, that the damages were too small; but he expressly declined a new trial as to Harriman alone.

The alleged grounds for a new trial, as against Light, and the argument thereon, relate to appellant's theory of the joint liability of the mortgagees above stated, and to the question of the sufficiency of the evidence.

It does not appear that the result reached as to Light was substantially incorrect, and we find no error for which the judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the costs of the appellant.

No. 8721.

ASHLEY ET AL. v. FOREMAN.

PLEADING.—*Estoppel*.—*Covenants*.—*Written Instrument*.—*Exhibit*.—A reply whereby the plaintiff seeks to estop the defendant from making a defence by him pleaded, by reason of written covenants of the defendant to the plaintiff, that the facts were other than as the defendant has pleaded, but not exhibiting a copy of the instrument containing the covenants, is bad.

SAME.—*Bad Reply to Bad Answer*.—A bad reply to a bad answer will be held good on demurrer.

PROMISSORY NOTE.—*Consideration*.—*Lease*.—*Assignment*.—*Eviction*.—To a suit on a promissory note payable to the plaintiff, the defendant answered failure of consideration, in that the consideration was the assignment to him by A. of a lease which had been forfeited, and that the landlord had by suit evicted the defendant therefrom.

Held, that the answer was bad on demurrer, it not appearing that there was fraud or any covenants in the assignment.

SAME.—*Mortgage*.—*Release*.—A. held a leasehold estate which he had mortgaged to the plaintiff, and thereupon he assigned the lease as to a portion of the lands to the defendant, who, in consideration that the plaintiff released the mortgage to the portion so assigned, with the consent of A., made the note in suit payable to the plaintiff.

Held, that whether the plaintiff received the note as collateral security for the debt of A. or as payment thereof, the consideration, as between the plaintiff and defendant, was the release of the mortgage.

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85	55
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85	55
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SUPREME COURT.—*Verdict.—Erroneous Instruction.*—Where a verdict is clearly right on the evidence, the Supreme Court will not disturb it, though erroneous instructions have been given.

From the Owen Circuit Court.

J. A. McNutt, S. W. Curtis, E. S. Holliday, T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, R. Hill and J. W. Nichol, for appellants.

S. Claypool and W. A. Ketcham, for appellee.

BICKNELL, C. C.—This suit was commenced in the superior court of Marion county, and was taken thence to Putnam county, and thence to Owen county, by changes of venue.

It was an action by the appellee against the appellants, upon their promissory note, payable to the appellee.

The defendants answered jointly in two paragraphs.

In the first paragraph they admit the execution of the note by Ashley as principal and Scott as surety, and plead a failure of consideration, to wit: That Bolin leased to Wingate and others certain coal lands, they agreeing to pay a monthly rent, and work the mines so that such rent should be not less than \$1,600 a year; that said lessees began said work, and then assigned their lease to Morris, he covenanting with them to fulfil all their agreements as lessees, and that in default thereof the assignment to him should be void; that Morris afterwards assigned the lease to Woodruff & Cotton, who sublet part of the leased premises, in all 90 acres, to Ashley; that the note in suit was given for said sublease, and was made payable to the plaintiff, at the request of Woodruff & Cotton, who gave the note to plaintiff as collateral security for a pre-existing debt; that when Woodruff & Cotton sublet the 90 acres to the appellant Ashley, they were largely in arrears upon the rent of the premises; that Bolin, the original lessor, had recovered a judgment against Wingate and others, the original lessees, for such arrears; and they had brought suit against Woodruff & Cotton, and had the assignment to them declared forfeited, and had obtained a perpetual

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injunction against Woodruff & Cotton and Ashley, restraining them from any work upon said premises, whereby said Ashley was evicted, etc., and the consideration of the note had failed. ·

The second paragraph of the answer states all the facts alleged in the first paragraph, and also that Woodruff & Cotton pretended to be the owners of said lease and the machinery, coal shaft and fixtures appertaining thereto; that, when said note was given, Woodruff & Cotton held the premises by assignment from Morris, who was the assignee of Wingate and others, the original lessees; that, by the terms of the lease to Wingate & Co., they were bound to sink a shaft and work the mine so as to produce a monthly rental equal to \$1,600 a year; that the note in suit was given in part payment for the purchase-money of said lease, shaft, machinery, and fixtures, which said Ashley bought from Woodruff & Cotton, who were then in possession thereof, and said note was, by their direction, made payable to the appellee, from whom none of the consideration of the note moved, and who had no interest in said leased premises and their appurtenances; that Woodruff & Cotton owed \$2,000 arrears of rent for said premises; that Bolin, the lessor, had sued Woodruff & Cotton, and Wingate & Co., to recover said arrears; that Wingate & Co., in said suit, had filed a cross-bill against Woodruff & Cotton, and that the result of this litigation was, that Bolin recovered a judgment against all the parties for the rent due, and Wingate & Co. obtained a decree declaring their assignment to Morris forfeited; that afterwards Wingate & Co., in a suit against the appellant Ashley and said Woodruff and others, obtained a judgment that the said Wingate & Co. were the lawful owners of said lease, shaft, machinery and fixtures, and also obtained an injunction forbidding said defendants from working said machinery, etc., or mining in said leased premises; whereby the appellant Ashley has been evicted, and has wholly lost said leasehold estates, shaft, machinery and fixtures, and the consideration of said note has wholly failed.

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There was no demurrer to either of the foregoing answers. The plaintiff replied in three paragraphs, to wit:

1st. The general denial.

2d. That the final judgments, mentioned in said answers, were rendered by reason of the default of said Ashley, in failing to pay the rent due upon his ninety acres, and not by the failure of Woodruff & Cotton to pay rent on the residue of said premises; that said Ashley had agreed with Woodruff & Cotton to perform all the stipulations of the original lease as to the said ninety acres, and failed to do it, but Woodruff & Cotton paid all that was due on that part of the leased premises retained by them.

3d. That the plaintiff, before the execution of the note in suit, held a mortgage executed by Woodruff & Cotton upon all of said leased premises and the appurtenances thereof, for the sum of \$15,000, to secure a debt due her from them, and that Ashley being about to purchase said lease as to said ninety acres, and being desirous to relieve said ninety acres from the lien of said mortgage, proposed to plaintiff that if she would release said ninety acres from said mortgage, he would give her his own notes, with Scott as surety, for the aggregate sum of \$6,960, to wit, three notes with eight per cent. interest, payable in one, two and three years, and would secure said notes by his own mortgage on said ninety acres, and its appurtenances, which proposition plaintiff accepted, and did release said ninety acres, etc., from the lien of said \$15,000 mortgage, and in consideration thereof said Ashley had the said three notes, one of them being the note in suit, made payable to the plaintiff, and on January 3d, 1877, executed to plaintiff his own mortgage as aforesaid, which was duly acknowledged and recorded on the 12th day of February, 1877. Wherefore plaintiff says that the consideration of said notes has not failed, and the plaintiff is a holder thereof for value.

The plaintiff, by leave of court, filed a fourth paragraph of reply, to wit:

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4th. Plaintiff admits the execution of the original lease and its assignment by Wingate & Co. to Morris, and by Morris to Woodruff & Cotton, and says that, while Woodruff & Cotton held the lease, they owed the plaintiff \$15,000, and, to secure said debt, mortgaged said leased premises and other lands to plaintiff, which mortgage was duly acknowledged and recorded in the county of Clay, where said leased property was, and where said mortgagors resided; that the appellant Ashley wished to purchase ninety acres of said leasehold property, with its appurtenances, and in order to procure the release thereof from the lien of said mortgage, agreed with plaintiff, that if she would release said property he would give her his three notes, aggregating \$6,960, as collateral security for so much of her said mortgage; that said notes should be signed by Ashley and Horace Scott, and that Ashley would secure said notes by a mortgage on said ninety acres; that said agreement was executed, the plaintiff released said ninety acres from the lien of her mortgage, and Ashley gave her said three notes, of which the note in suit is one, and executed to her a mortgage as aforesaid to secure the same; and said plaintiff says, that, by reason of said last mentioned mortgage, the appellants are estopped from claiming that they have not a good title to said ninety acres, etc.

The appellants' motion to strike out the fourth paragraph of the reply was overruled, and the appellants' demurrer to said fourth paragraph for want of sufficient facts, etc., was also overruled. The issues were tried by a jury, who returned a verdict for the plaintiff for \$2,882.87. The appellants' motion for a new trial was overruled; judgment was rendered upon the verdict, and this appeal was taken.

The errors assigned are that the court erred in overruling the demurrer to the fourth paragraph of the reply, and in overruling the motion for a new trial.

The counsel for the appellee have not furnished a brief.

The appellants claim that the fourth paragraph of the reply was insufficient, because, although it avers that a copy of the

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mortgage for \$15,000, executed by Woodruff & Cotton to the appellee, is filed with and made part of the reply, and also that a copy of the mortgage made by Ashley to the appellee to secure the three notes, of which the note in suit was one, is filed with and made part of the reply, yet in fact no copy of either of said mortgages was filed with or made part of the reply.

The allegations of the reply as to the mortgage by Woodruff & Cotton to the plaintiff are as follows: "By which mortgage they covenanted the title in and to said leased property to be good and perfect; a copy of said mortgage or bill of sale, containing a copy of said note of Woodruff & Cotton to plaintiff, is filed herewith as a part hereof, the same as if said note and mortgage were herein fully copied and set out."

In this reply the covenants in the mortgage are relied on. The reply neither sets out the mortgage nor gives a copy of it. It was, therefore, insufficient. *Douglass v. Keehn*, 71 Ind. 97; *Brown v. State, ex rel.*, 44 Ind. 222; *Cook v. Hopkins*, 66 Ind. 208; *Galbreath v. McNeily*, 40 Ind. 231; *Coleman v. Hart*, 25 Ind. 256; *Woodford v. Leavenworth*, 14 Ind. 311.

The allegations of the reply as to the mortgage by Ashley to the plaintiff are as follows:

"That after said release said Ashley purchased said last described property from said Woodruff & Cotton, and, pursuant to his agreement, made and executed the three notes above mentioned, signed by himself and Horace Scott, and also made and executed the mortgage to secure the payment of said three notes. A copy of said mortgage is herewith filed and hereof made part, the same as if it were herein fully copied. Said property mentioned in said last mentioned mortgage is the same property as, and none other than, the property set out and described in the lease from Bolin to Wingate, Ackelmire and Andrews, and the same property from which the defendants allege they have been evicted, and which they allege has been taken from them under the decree of the Clay Circuit Court, as in said answer alleged. And said plaintiff

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alleges that, by reason of the last mentioned mortgage, the said Ashley and Scott are estopped from asserting and claiming that they have not a good title in and to said leasehold property."

Here the reply is founded upon Ashley's mortgage as creating an estoppel. If the defendants are to be estopped by the legal effect of a writing the original or a copy of it must be set forth. *Coleman v. Hart, supra*. The fourth paragraph of the reply, therefore, was also defective, for want of a copy of Ashley's mortgage; but the reply was good enough for the answer. *Starkey v. Neese*, 30 Ind. 222. The defendants in each paragraph of the answer undertake to show failure of consideration. They aver that the note was given in payment for certain leasehold property, to which the title failed, and from which they were evicted, but there is no allegation of fraud or breach of covenant, and, for aught that appears in either paragraph of the answer, Ashley may have had a quitclaim title only. There is no copy of his lease annexed to the answer. In *Laughery v. McLean*, 14 Ind. 106, this court said: "The deed is not set out, nor is it averred in the answer that it contained any covenants of seizin, right to convey, or any other covenants whatever. If the deed contained any covenants that were broken, the original or a copy thereof should have been filed as the foundation of the defence (Code, § 78), and there should have been such facts averred as would show a breach of the covenants relied upon. * * * For aught that appears, the conveyance was a mere quitclaim, without any warranty whatever; and in such case, in the absence of fraud, a want or failure of title can not be set up in bar of the action for the purchase-money." This case was followed in *Coleman v. Hart, supra*, and in *Starkey v. Neese, supra*; *Jenkinson v. Ewing*, 17 Ind. 505; *Church v. Fisher*, 40 Ind. 145. There was no error, therefore, in overruling the demurrer to the fourth paragraph of the reply. *Ætna Ins. Co. v. Baker*, 71 Ind. 102. The demurrer to the reply might have been properly sustained as to each paragraph of the answer. *Ætna Ins. Co. v. Baker, supra*.

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The other error assigned is overruling the motion for a new trial.

The reasons assigned for a new trial were :

1st. The verdict is contrary to the law and to the evidence.

2d. The verdict is contrary to the evidence.

3d. The court erred in refusing to permit defendants to introduce and read in evidence to the jury the duly certified transcript of the judgment and proceedings in the Clay Circuit Court, in the case of John F. Ackelmire, Robert M. Wingate and John Andrews against Amos H. Woodruff, Addison J. Trunkey, Jerome H. Trunkey and John Ashley, as shown by bill of exceptions No. 1.

4th. Error of the court in refusing to permit defendants to introduce and read in evidence to the jury the transcript of the judgment and proceedings in the case of *John Bolin v. Robert M. Wingate, John Andrews, John G. Ackelmire, Austin D. Cotton and Amos H. Woodruff*, as shown by bill of exceptions No. 2.

5th. Error of the court in refusing to permit defendants to introduce in evidence and read to the jury the transcript of the judgment and proceedings of the Clay Circuit Court, in the case of *John Bolin v. Robert M. Wingate, John G. Ackelmire, John Andrews, Amos H. Woodruff and Austin D. Cotton*, as shown by bill of exceptions No. 3.

6th. Error of the court in giving instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 10.

It appeared in evidence, that Woodruff & Cotton were lessees of certain lands, with the privilege of mining coal therein, and that their lease was liable to forfeiture upon non-payment of certain stipulated royalties. They had mortgaged their interest to Mrs. Foreman, the appellee, to secure \$15,000 borrowed by them from her. Ashley desired to purchase from Woodruff & Cotton 90 acres of the leased property and the coal privileges thereto appertaining, but he could not take the property subject to such a mortgage; an agreement was then made between Woodruff & Cotton and Mrs. Foreman,

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the appellee, and Ashley, by which Woodruff & Cotton were to transfer the 90 acres and its coal privileges to Ashley, and Mrs. Foreman was to release said 90 acres from the lien of her mortgage, and Ashley was to give his notes for the price of the 90 acres, one of them being the note in suit; all of said notes to be made payable to and delivered to Mrs. Foreman, in consideration of her releasing said 90 acres from the lien of her \$15,000 mortgage, and said notes to be secured to Mrs. Foreman by a mortgage of said 90 acres and appurtenances by Ashley to her. This agreement was fully carried into effect, and this suit is upon one of those notes. The defendants were seeking to show, as a defence to said note, that Woodruff & Cotton failed to pay their royalties, whereby their lease was declared forfeited, and Ashley lost his 90 acres, which the defendants alleged was the real consideration of the note; but, as between Ashley and Mrs. Foreman, the real consideration of the note was the release by her of the 90 acres from the lien of the \$15,000 mortgage; it was that release which enabled Ashley to purchase the 90 acres, and for that, by consent of Woodruff & Cotton, he gave the note; the forfeiture of the lease and the subsequent loss by Ashley of the 90 acres did not affect the consideration of the note as between Ashley and Mrs. Foreman, and were no defence against the note, and whether she took the note as payment of so much of her claim against Woodruff & Cotton, or only as collateral security, is immaterial, as in either case her right of action upon the note was perfect.

The verdict, therefore, was not contrary to the evidence, and not contrary to law, and there was no error in rejecting the record evidence mentioned in the reasons for a new trial. That evidence was immaterial and irrelevant.

The merits of the cause having been fairly tried and determined in the court below, and a just result having been reached upon the evidence, this court will not consider whether the instructions were absolutely correct in every particular. Practice Act, secs. 101, 580; *Hedge v. Sims*, 29 Ind. 574.

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There was no substantial error in overruling the motion for a new trial. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—In this petition it is claimed that the established rule of this court, to wit: that a demurrer searches the record, and that a bad reply is good enough for a bad answer, ought to be overruled; but that rule was adopted more than twenty years ago, upon full consideration, as a result of the amendment of section 54 of the civil code of 1852, which amendment took effect on August 17th, 1855. It would be an unwarrantable innovation to change that rule now.

It is also claimed that the answers were not bad, because the lease was not real estate, but only a chattel real. The answers, however, alleged eviction, and where there is a written transfer of such property, and the writing is relied on as a defence, by reason of the covenants in it which are alleged to be broken, it is just as necessary that a copy of the writing be annexed to the answer as it is upon a like transfer of real estate. Upon this point we adhere to the principal opinion.

The last point made in the petition is that the motion for a new trial ought to have been granted. This point was fully considered in the principal opinion. We need not repeat its statements. There was really no valid defence to the note. The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Blake et al. v. Blake et al.

No. 10,113.

BLAKE ET AL. v. BLAKE ET AL.

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DESCENTS.—Statutes Construed.—Collateral Heirs.—Distribution.—Collateral relatives in the second degree, where any in the first degree also survive, take *per stirpes*, under R. S. 1881, sections 2468, 2469 and 2470. Thus, the heirs being nine nephews surviving, and grand-nephews, children of two nephews deceased, the latter take the shares which would have gone to their respective parents had they survived.

From the Putnam Circuit Court.

I. L. Bloomer, R. Hill and J. W. Nichol, for appellants.

J. Birch, J. N. Sims, J. E. McDonald and J. M. Butler, for appellees.

COOMBS, J.—This suit was submitted to the court below for trial, upon a complaint by the appellant and a cross complaint by the appellee, for the partition of lands amongst collateral heirs. Upon the request of the appellants, the court found the facts specially, and its conclusions of law thereon as follows: “The court finds that on or about the 21st day of January, 1881, said Jesse Blake, named in said complaint and cross complaint, died intestate, in Putnam county, Indiana, leaving no widow, and without issue or their descendants alive, and without father or mother; and leaving as his sole and only heirs at law, said plaintiffs, John G. Blake, James R. Blake and William M. Blake, the sons of James Blake, deceased, who was a brother of said Jesse Blake, deceased; and, also, said plaintiff Walter G. Blake, an infant son of Walter A. Blake, deceased, who was a son of said James Blake, deceased; and that said James Blake died before said Jesse Blake; also, said defendants, John W. Blake, William H. Blake, James H. Blake, Mariah J. Henderson, now the widow of Charles Henderson, deceased, Mary M. Given, widow of David Given, deceased, and Sarah A. Catterlin, who were all children of John Blake, deceased; also said defendant Miriam E. McFarland, wife of said David H. McFarland, daughter of Caroline Dunn,

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deceased, who was a daughter of said John Blake, deceased, who was a brother of said Jesse Blake, deceased. And the court further finds that said Caroline Dunn and said John Blake both departed this life before the death of the said Jesse Blake, deceased; and the court further finds, that at the time of the death of said Jesse Blake, he was seized in fee simple of all the real estate described in the complaint and cross complaint herein" (describing it). "*Second.* That said John G. Blake, James R. Blake, Mary E. Blake, Walter G. Blake, William H. Blake, Mariah J. Henderson, Mary M. Given, Sarah A. Catterlin, Miriam E. McFarland, John W. Blake and James A. Blake are each the owners in fee simple, and entitled to one-eleventh part in value of all of said real estate, as tenants in common. *Third.* That the said real estate ought to be sold, and after payment of the costs and expenses of said sale, and the costs of this suit, the residue of the proceeds derived from said sale ought to be divided equally between them."

Exceptions by the appellants to the conclusions of law upon the facts found by the court were overruled, and a judgment rendered upon the findings of the court.

From this judgment the plaintiffs appealed to this court. The only error assigned is, that the court erred in its conclusions of law, which presents the only question for the consideration of this court.

Lengthy written and printed arguments have been presented by the attorneys on each side—the appellants' counsel contending that the family of James Blake, deceased, consisting of four persons, inherited one equal half of the estate, and the family of John Blake, consisting of seven persons, the other half; counsel for the appellees contending that they all took equally, *per capita*. The argument of appellants' counsel seems to have been predicated upon the assumption that these parties in some way inherited through their deceased fathers, instead of inheriting directly from their uncle Jesse Blake. The only statutes bearing upon this subject are the first four sections of the act relating to descents. 1 R. S. 1876, p. 408. The

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primary object of the Legislature, as expressed by these sections, was that estates should descend equally to the next of kin, as a class, whether lineal or collateral, however numerous, or however remote from the ancestor; with the single exception that where one or more of a class had died leaving children, such children should inherit the share which would have descended to their father and mother, if living, though such children are one degree farther removed from the ancestor. Sec. 1 provides that the estate of an intestate shall descend to his or her children, in equal portions.

Sec. 2. "If any children of such intestate shall have died intestate, leaving a child or children, such child or children shall inherit the share which would have descended to the father or mother, and grandchildren, and more remote descendants, and all other relatives of the intestate, whether lineal or collateral, shall inherit by the same rule: *Provided*, That if the intestate shall have left at his death grandchildren only alive, they shall inherit equally."

This court has applied this rule to a class of lineal heirs one degree farther removed from the ancestor, holding that where the estate descends to grandchildren, and one or more of that class has died, leaving a child or children, such great grandchildren will inherit the shares the parent would have inherited, if living. *Cox v. Cox*, 44 Ind. 368.

This rule also applies to collateral heirs. Sec. 3 of the act provides that if any intestate shall die without lawful issue, or their descendants alive, one-half of the estate shall go to the father and mother of such intestate, as joint tenants, or to the survivor of them; and the other half to the brothers and sisters, and to the descendants of such as are dead, as tenants in common.

Sec. 4. "If there be neither father nor mother, the brothers and sisters of the intestate living, and the descendants of such as are dead, shall take the inheritance as tenants in common."

From these several provisions it is clear that if all the brothers and sisters of an intestate are dead, leaving children

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alive, their children form a class, all equally near of kin to their ancestor, and will take the estate *per capita*. But if one or more of this class have died leaving children, such children would take their parents' share *per stirpes*. In the case at bar the next of kin, being the children of John and James Blake, deceased, brothers of Jesse Blake, the intestate, will inherit directly from their ancestor *per capita*; and as two of this class had died, each leaving one child only, it follows that the several nephews and nieces and the grand-nephew and grand-niece will all inherit equally, and that each is entitled to the one-eleventh part of the estate of Jesse Blake, deceased.

Judgment affirmed, with costs.

No. 8470.

BOARD OF COMMISSIONERS OF MORGAN CO. v. PRITCHETT.

RES ADJUDICATA.—*Decisions of Supreme Court*.—The decision of the Supreme Court upon a question, where the case is reversed, governs in all subsequent stages of the case, even in the Supreme Court upon a subsequent appeal.

COUNTY COMMISSIONERS.—*Claims*.—*Appeal*.—*Statute Construed*.—The act of 1879, R. S. 1881, sections 5758, 5760, 5769, operates prospectively only, and where suits were pending in circuit courts, against counties, when that act took effect, it did not deprive the courts of jurisdiction thereof.

BRIDGES.—*Repairs*.—Counties are liable for neglecting to keep their bridges in a reasonably safe condition.

From the Owen Circuit Court.

F. P. A. Phelps, W. S. Shirley, J. C. Robinson and I. H. Fowler, for appellant.

G. W. Grubbs and M. H. Parks, for appellee.

• ELLIOTT, J.—This case is here for the second time; when here before a judgment was pronounced declaring the complaint to be sufficient, and that controls us as to all questions then before the court and decided; for a judgment on appeal conclusively settles the questions decided, and governs the case, as to the points decided, throughout all its subsequent stages.

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126	488
85	68
137	144
138	614
85	68
146	813

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It is, however, insisted, that the complaint in this case is different from the one passed upon in the former appeal, and that it is insufficient because it does not show that appellee's claim was presented to the board of commissioners prior to the commencement of this action. Granting that this is a new element in the case, and not involved in the former decision, the contention can not prevail, for it is settled that, under the law in force when this action was begun, the claimant was not required to file his claim with the board as a condition precedent to his right to maintain an action. *Board, etc., v. Ford*, 27 Ind. 17.

It is contended that the act of March 29th, 1879, divested the circuit court of jurisdiction, and put an end to all cases pending in the circuit courts of the State in which claims had not been first acted upon by the commissioners. It is clear to our minds that the Legislature intended the provisions of that act to apply to claims filed subsequent to its adoption, and not to actions commenced prior to its passage. The statute was intended to have a prospective and not a retrospective effect. It is a familiar rule that statutes will not be given a retroactive effect unless the rigor of the language is such as to compel the courts to adopt that construction.

When the case was here before the principal point decided was, that counties are liable for a negligent omission to keep in a reasonably safe condition the bridges upon their public highways, and that decision can not be overthrown without a violation of the rule stated in the opening sentence of this opinion. *Pritchett v. Board, etc.*, 62 Ind. 210. If we should now be of the opinion that the principle of law was erroneously decided, we could not change the ruling so as to affect this case; but if we were at liberty to change the former ruling, we would not do so. *House v. Board, etc.*, 60 Ind. 580 (28 Am. R. 657); *State, ex rel., v. Board, etc.*, 80 Ind. 478 (41 Am. R. 821); *State, ex rel., v. Demaree*, 80 Ind. 519.

Judgment affirmed.

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No. 9119.

WELLS v. SUTTON.

PROMISSORY NOTE.—Action by Endorsee.—Plea of Property in Another.—Ownership.—Attorney.—It does not show a defence to an action on a note by an endorsee to aver that it was endorsed to the plaintiff by one who, as attorney, took the note for his client and without authority caused it to be made payable to his own order.

SAME.—Principal and Agent.—Apparent Authority.—If the owner of a promissory note, drawn payable to his agent, leaves the note in the agent's possession, and the latter endorses it to an innocent purchaser, the owner can not dispute the transfer.

SAME.—Fraud.—False Representations Must be Material.—It is no defence to a note made payable to an attorney of the owner, that the attorney falsely represented that his client had a cause of action against the maker for criminal intimacy with the client's wife, and had papers in the hands of an attorney at Piqua, Ohio, to begin suit for \$20,000, unless a compromise could be made, etc. The defendant, being necessarily cognizant of the facts, had no right to be influenced by such representations.

SAME.—Criminal Conversation.—Damages.—Contract for Silence.—Defence.—It is a good defence to a suit on a note given in settlement of damages claimed for criminal intimacy with the wife of the payee, that as a part of the settlement the parties agreed in writing that the note should be void if the payee should ever speak of such intimacy, and that he had broken this agreement.

PLEADING.—Practice.—Written Instrument.—Excuse for not Giving Copy.—If a pleading is based on a written instrument, a copy should be exhibited; but it is a sufficient excuse for not giving a copy, that the depository of the writing had refused to deliver it or to furnish a copy.

From the Randolph Circuit Court.

G. H. Koons and W. March, for appellant.

J. M. Haynes, J. W. Headington and J. J. M. LaFollette, for appellee.

WOODS, C. J.—Action upon two promissory notes alleged to have been made by the appellee to Theodore Brumbaugh, who had endorsed them to another, who had endorsed them to the appellant, the plaintiff in the action.

The appellee answered by five special pleas, and also filed a counter-claim, upon which he prayed a cancellation of the

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notes. Separate demurrers to each plea and to the counter-claim, for want of facts, were overruled, and exceptions taken to the rulings. Issue was joined and a trial had in the Jay Circuit Court, where the action was commenced, resulting in a verdict for the defendant. This verdict the court set aside on motion of the appellant, and granted him a change of venue to the Randolph Circuit Court, in which a second trial upon the same issues resulted in the judgment from which this appeal is prosecuted. Error is assigned upon the overruling of the demurrers to answers, and of the motion for a new trial.

The notes in suit are not governed by the law merchant, and, consequently, there is no question of the rights of an innocent purchaser of mercantile paper.

In the second paragraph of the answer, which is verified, the execution and endorsement of the notes as alleged are admitted, and it is averred: "That one Francis M. Shrack is the real party in interest, and owner of said notes; that the notes were given to satisfy and settle a demand or claim against defendant in favor of said Shrack; that Brumbaugh, the payee named in the notes, who was acting as the attorney for Shrack, took the notes payable to himself, without the authority of Shrack; that Brumbaugh, the payee, had no interest whatever in the notes, or either of them; but Shrack is the owner thereof."

This plea falls short of showing that the plaintiff is not the real party in interest, and, not showing this, it is clearly not otherwise good. The apparent meaning of the averments is that the notes were executed in settlement of Shrack's demand against the defendant, and that Brumbaugh exceeded his authority, not in making the settlement and in taking the notes, but simply in taking them in his own name; and, consequently, that he held them, not as his own, but as a trustee for Shrack. It is not, however, alleged, nor can it be inferred from what is alleged, that the endorsement of the note by Brumbaugh to the appellant's endorser was unauthorized. It is averred that Shrack is the owner, and from this it may be inferred that

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Shrack had assented to and ratified the taking of the notes in the form in which they were made, for, unless ratified, they did not become his property; and if, after such ratification, Shrack permitted the notes to remain in the possession of Brumbaugh, he thereby clothed him with authority, or at least estopped himself from denying his authority, to endorse them to another. Unless the averments of a pleading are clear and unequivocal, the reasonable intendments, on demurrer, will be held to be against the pleader; and, while the allegations of this plea are, perhaps, sufficient to show that Brumbaugh took the notes as agent for another, it by no means appears that he did not have or obtain authority to make the alleged assignment to the appellant's endorser. The allegation in the present tense, that "Shrack is the owner," is at most only a statement of a legal conclusion, and is not sufficient to help out the plea when tested by a demurrer.

It is insisted on the authority of *Rogers v. Place*, 29 Ind. 577, and *French v. Blanchard*, 16 Ind. 143, that, having made the notes payable to Brumbaugh, the appellee was estopped to deny that the payee named was the real party; but we do not find it necessary to decide upon this point. It may be observed, however, that upon the facts stated in the plea, the notes, unless authorized or ratified by Shrack, are shown to be without consideration, and it is because such ratification is shown, or is inferable, that the plea is not good as a plea of no consideration.

In the third paragraph of answer, the making and endorsement of the notes as alleged are admitted, but it is alleged that they were obtained by fraud, in this: That the payee, Brumbaugh, falsely and fraudulently represented to the defendant, that Francis M. Shrack had and held a cause of action against the defendant for alleged criminal intimacy with his wife, and that said Shrack had then the papers all drawn up and in the hands of his attorneys, at Piqua, Ohio, to begin suit against the defendant for \$20,000 damages; and that the suit would

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be brought at once unless a compromise could be made, and that he, Brumbaugh, was authorized as agent to settle the same with the defendant; that, relying on said false and fraudulent representations, and desiring to avoid a litigation, the defendant executed the notes sued on, without any other consideration; that Brumbaugh at the time well knew that said representations were false, and that said Shrack had not prepared, or caused to be prepared, any papers for a suit, nor was he threatening to prosecute any suit, against the defendant. Wherefore, etc.

We think this answer insufficient. It is not denied that there was foundation for the alleged demand, and if this were denied, it could not well be claimed that the defendant was ignorant on the subject, and had a right to believe the representations. It is not denied that Brumbaugh was authorized to negotiate the settlement, and that through him Shrack was demanding of the defendant reparation for the alleged criminal intercourse. In this situation, the representations in respect to preparations for bringing a suit become, in our opinion, immaterial and unimportant; they are not such as the defendant had a right to rely on or to be influenced by.

The fourth paragraph alleges a voluntary written release by Shrack, delivered to the defendant before he had notice of the alleged assignment of the notes by Brumbaugh, who held the notes as trustee for Shrack. This plea is defective, because, if for no other reason, a copy of the release is not made an exhibit.

In the fifth paragraph it is alleged, that the notes were made to the payee in trust for Shrack, in settlement of a pretended claim against the defendant for alleged criminal intimacy with Shrack's wife, and for no other consideration; that, as a part of the contract on which the notes were made, Shrack executed to the defendant a writing, whereby he undertook and bound himself "never after to refer to or speak of said criminal intimacy, and that any violation of said agreement

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should work a forfeiture of said notes, and all right of action thereon, and that the same should be surrendered to the defendant ;" that said bond was placed in the hands of Brumbaugh, the payee of the notes ; that he, upon request, had refused to deliver the bond or to furnish a copy thereof to the defendant, and consequently he can not exhibit a copy ; that said Shrack at divers times and places spoke of and referred to said criminal intimacy in public, and gave publicity to the same in violation of the agreement.

The objections urged to this plea are, that the alleged excuse for not setting out a copy of the agreement is insufficient, and that the agreement itself is void as against public policy. We think neither objection tenable. It may be that Brumbaugh was not bound to furnish a copy of the writing, and that the defendant should have made one for himself, but this he could not do if Brumbaugh, as is alleged, refused to deliver the agreement to him.

There is no rule of public policy which forbids such a contract for silence so long as it is not in contemplation to conceal and prevent the punishment of a crime. It does not appear, and will not be presumed, that, in this instance, a crime had been committed ; nor but that, if there had, its punishment had been barred by lapse of time before the agreement was made. The public morals will surely not suffer by the suppressing of such scandals, and if the individuals concerned see fit to put their settlements and contracts on such a basis, they may do so, and must be held to the legal consequences.

The questions presented under the motion for a new trial we deem it unnecessary to consider.

The judgment is reversed, at the costs of the appellee, with instructions to sustain the demurrers to the second, third and fourth paragraphs of answer.

Deputy v. Hill, Administrator.

No. 9517.

DEPUTY v. HILL, ADMINISTRATOR.

APPEALS TO SUPREME COURT.—*Assignment of Errors.*—*Appellant's Complaint.*

—*Dismissal.*—On an appeal to the Supreme Court the appellant must, under section 655, R. S. 1881, enter on the transcript a specific assignment of all errors relied upon. The assignment of errors constitutes the complaint of the appellant in the Supreme Court, and, in the absence of such an assignment, the appeal will be dismissed.

From the Jennings Circuit Court.

W. Dixon and L. Dixon, for appellant.

A. G. Smith, for appellee.

HOWK, J.—The appellee has moved this court in writing to dismiss the appeal in this case, for the following causes:

“1. Because there is no assignment of error filed herein, and none was ever filed; and,

“2. Because said case has been on the docket of this court during two terms, without being submitted.”

The appellant has appeared to this motion, and by a counter motion has asked leave and offered to file now an assignment of errors.

The transcript in this case shows that the judgment below was rendered on the 12th day of June, 1880. Two days before the expiration of the year within which an appeal could be taken from the judgment, to wit, on the 10th day of June, 1881, the transcript was filed in the clerk's office of this court, as and for such appeal. Of course the appeal was taken in vacation, and not in term, for it could not be taken otherwise at the time. Under section 556 of the civil code of 1852 (section 640, R. S. 1881), appeals might be taken after the close of the term at which the judgment was rendered, in two modes: 1. By serving notice in writing on the adverse party or his attorney, and also on the clerk of the proper court, “stating the appeal from the judgment or some specific part thereof;” or, 2. By procuring from the clerk of the court a transcript of the record and proceedings in the suit,

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or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of this court, who should endorse thereon the time of filing, and issue a notice of the appeal to the appellee.

In this case it is manifest that the appellant intended and attempted to take his appeal in the second mode by procuring and filing a transcript of the record in the clerk's office of this court; but it does not appear that any notice of his appeal, by his procurement or otherwise, has ever been issued to the appellee. If the appellant had caused the proper notice to be issued to the appellee at the time of filing the transcript, the appeal would have stood for trial at the November term, 1881, of this court; and, in that event, the law would have required him to enter on the transcript, on or before the first day of that term, "a specific assignment of all errors relied upon." Section 655, R. S. 1881. In *Pruitt v. Edinburg, etc., Turnpike Co.*, 71 Ind. 244, the appeal was dismissed for the want of any assignment of errors. The court said: "This assignment of error constitutes the appellant's complaint or cause of action, in this court. In the absence of such an assignment, we are not informed, in any legal manner, of what supposed errors the appellant complains, or upon what grounds the judgment below is sought to be reversed." *Hays v. Johns*, 42 Ind. 505; *Wiggs v. Koontz*, 43 Ind. 430; *Pahmeyer v. Groverman*, 60 Ind. 7; *Elder v. Sidwell*, 66 Ind. 316.

We are of the opinion, therefore that the appellee's motion to dismiss this appeal, for the want of any assignment of error entered on the transcript, is well taken and must be sustained. No sufficient excuse is shown for the failure and neglect of the appellant to prosecute his appeal, with reasonable diligence, and his counter motion must be and is overruled.

The appeal is dismissed, at the appellant's costs.

Himes *et al.* v. Langley.

No. 9674.

HIMES ET AL. v. LANGLEY.

85	77
124	591

PLEADING.—*Complaint.*—*Certainty.*—*Demurrer.*—If a complaint, construed according to the fair import of its averments, makes a cause of action, it will resist a demurrer, though it be uncertain.

VENDOR AND PURCHASER.—*Vendor's Lien.*—*Acceptance of Worthless Security.*—*Fraud.*—*Waiver.*—*Diligence.*—The acceptance of worthless securities for the payment of purchase-money, induced by the fraudulent representations of the purchaser, is not a waiver of the vendor's lien for unpaid purchase-money of real estate, but suit must be brought promptly upon discovery of the fraud, if the rights of others may be affected by delay.

SAME.—A vendor's lien may be enforced for a part only of the purchase-money.

SAME.—*Promissory Note.*—When land is exchanged for promissory notes of other persons, which the vendor is induced by fraud to receive in exchange for the land, no price having been fixed for the land, and no credit given for purchase-money, nor any promise by the vendee to make further payments, no right to a vendor's lien exists.

SAME.—*Contract.*—*Rescission.*—*Fraud.*—A suit to rescind a contract for fraud, whereby the plaintiff was induced to receive worthless notes in exchange for real estate, must be brought promptly upon the discovery of their worthlessness, and dealing with the notes afterwards as his own forfeits the right to rescind.

From the Howard Circuit Court.

J. O'Brien, M. Garrigus and C. C. Shirley, for appellants.

J. C. Blacklidge and W. E. Blacklidge, for appellee.

NIBLACK, J.—Complaint by Silas Langley against William H. McCurdy and Julia A. McCurdy, his wife, and Timothy L. Himes and Lydia Himes, his wife, to enforce a vendor's lien. The action was commenced on the 25th day of February, 1880.

The complaint was in three paragraphs.

The third paragraph was the only one held to be good upon demurrer as against all the defendants.

After issue, and upon a trial by a jury, there was a verdict in favor of the plaintiff, finding that the defendant William H. McCurdy was indebted to him in the sum of \$864.85, and that the sum so found to be due ought to be decreed to be a

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lien on the real estate described in the complaint. New trial denied, and judgment on the verdict.

The first complaint here upon the proceedings below is, that the court erred in overruling the demurrer to the third paragraph of the complaint.

That paragraph charged that, on the 29th day of December, 1874, the plaintiff sold and conveyed to the defendants William H. McCurdy and Julia A. McCurdy a certain described tract of land in Howard county, containing twenty acres; that the said Julia was then, and still is, the wife of the said William, and that at the request of the said Julia, and with the full knowledge and consent of the said William, the plaintiff executed the deed for said land to him, the said William, who was a mere volunteer, and paid no part of the consideration for which such conveyance was made; that the said Julia, with the consent of the said William, and as a part of the consideration for said land, promised to pay the plaintiff the sum of \$333.33 on the 1st day of June, 1877, and the further sum of \$333.34 on the 1st day of June, 1878, without relief from valuation laws, and with six per cent. interest after the 1st day of June, 1875; that as evidence of her promise to pay said sum of money, and as security for the payment thereof, the said Julia, in conjunction with the said William, as her husband, by their endorsement in writing, assigned and transferred to the plaintiff two certain promissory notes, both executed by Aegidius Naltner and J. Henry Kappes to the said Julia, and bearing date June 2d, 1874, the first for \$333.33, payable on the 1st day of June, 1877, at six per cent. interest after June 1st, 1875; and the second for \$333.34, payable on the 1st day of June, 1878, with like interest after June 1st, 1875; that the makers of said promissory notes, on said 29th day of December, 1874, resided in the city of Indianapolis, in this State, and that at the time of the sale and conveyance of the land as above set forth, and previously thereto, the said Julia and the said William represented that both of said promissory notes were

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amply secured by mortgage on real estate situate in Marion county, also in this State, where the mortgage was duly recorded; that by reason of such representations, in which he believed and upon which he solely relied, the plaintiff was induced to accept said promissory notes; that said representations were made in the county of Howard, where the plaintiff then resided and still resides; that said notes were never at any time secured by mortgage on real estate or any other property, and that the same were worthless at the time the plaintiff accepted them, as well as at the time of their maturity; that the said Julia and William falsely and fraudulently represented that said promissory notes were secured by mortgage, for the purpose of inducing the plaintiff to accept said notes as security for a portion of the purchase-money of the land so sold and conveyed by him, they, the said Julia and William, well knowing that said notes were not secured by mortgage, and were worthless as security for any portion of said purchase-money; that the plaintiff afterwards learned that said notes were worthless, and he then repudiated, and still repudiates, them as a security for said purchase-money, and has since frequently informed the defendants that he intended to hold the land liable for the payment of the unpaid purchase-money; that the said Julia is the equitable owner of the land, the said William only holding the naked legal title thereto; that the defendants Timothy L. Himes and Lydia Himes claim to own an interest and estate in said land, the nature and extent of which is unknown to the plaintiff, and are now in the possession of the land; that before they acquired any interest in said land, they had notice and actual knowledge of the non-payment of the purchase-money for the same by their co-defendants, and of all the material facts herein above charged; that the said William and Julia were at the time of their purchase of the land, and have ever since continued to be, openly and notoriously insolvent; that the plaintiff now repudiates and rejects said promissory notes and his acceptance thereof as above herein recited, and brings

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said notes into court and tenders them to the defendants; that the purchase-money, which said notes were assigned and transferred to the plaintiff to secure, still remains unpaid. Wherefore the plaintiff demanded judgment, and a decree for the sale of the land to satisfy whatever judgment might be rendered in his favor.

The court below might have required the complaint to have been made more specific in its description of the contract of sale by the plaintiff to McCurdy and wife; also as to its averment as to the time at which the alleged worthlessness of the promissory notes accepted by the plaintiff was discovered by him; but the complaint was not bad upon demurrer because of its uncertainty in these respects.

A vendor's lien may be enforced for a part only of the purchase-money. *Dart Vendors & Purchasers of Real Estate*, p. 351.

It can not be said that the complaint showed any unnecessary delay in bringing this action after the discovery that the notes were worthless, as it did not aver when that discovery was made.

The representation that the notes were secured by a mortgage, which was recorded in another and a distant county, was a material representation, and one on which the plaintiff was, under the circumstances, authorized to rely.

The acceptance of a worthless security by a vendor, induced by the fraudulent representations of the vendee, does not discharge the vendor's lien. 1 *Jones Mortgages*, sec. 207; 1 *Hilliard Mortgages*, 697, sec. 40; *Davis v. Cox*, 6 Ind. 481; *Haugh v. Blythe's Ex'rs*, 20 Ind. 24; *Fouch v. Wilson*, 60 Ind. 64 (28 Am. R. 651); *Martin v. Cauble*, 72 Ind. 67; *McDole v. Purdy*, 23 Iowa, 277; *Felton v. Smith*, 84 Ind. 485.

The filing of the notes with the complaint, ostensibly as a part of it, and at the same time purporting to bring the notes into court for the use of the defendants, constituted a somewhat anomalous proceeding, to which motions, either to strike out or to have made more certain, might have been well di-

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rected, but the anomaly thus presented was not reached by the demurrer to the complaint.

The notes were not the foundation of this action, in the sense which required them to be filed with the complaint, or which made them a part of the complaint by being filed with it.

Construing the third paragraph of the complaint, however, according to what appears to have been the fair import of its averments, we regard it as having been substantially sufficient upon demurrer.

The evidence showed that the land in controversy was, in the latter part of December, 1874, sold and conveyed by the plaintiff to the defendant William H. McCurdy; that the plaintiff received in exchange, and in consideration therefor, the two notes described in the complaint, which were the separate property of Julia A. McCurdy, and one other similar note in tenor and amount, but due at a date previous to the times at which both the others were respectively payable; that, some time after he became the owner of the notes, the plaintiff endorsed them to his sister Amanda Langley; that, in June following, McCurdy and wife sold and conveyed the land to their co-defendant, Timothy L. Himes, who, in March, 1876, went into possession, and has ever since so continued; that, in the latter part of June, 1875, the plaintiff caused his sister to endorse the notes to a bank in Kokomo as collateral security for money borrowed by him; that this borrowed money was afterwards repaid, and the notes returned to his sister; that the plaintiff afterwards traded the notes to one Miller for a tract of land, which he, the plaintiff, caused to be conveyed to his sister; that afterwards, some dissatisfaction occurring about this trade, Miller returned the two notes mentioned in the complaint to the plaintiff, under whose direction the land was reconveyed to Miller by the sister; that, for some reason not explained, Miller retained and never returned the note first due; that, in the latter part of the year

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1877, the plaintiff took a judgment in one of the courts of Marion county against the makers, on the note due in that year.

The plaintiff, after testifying to the representations made by McCurdy and wife as charged in the complaint, stated that in January, 1875, a few weeks after receiving the notes, he became aware that the notes were worthless; that he thereupon immediately notified McCurdy and wife that he repudiated his acceptance of the notes, and would look to his lien on the land for the payment of the purchase-money.

As to these statements, however, and in most other respects, the evidence was quite conflicting.

The next complaint here is that the evidence did not sustain the verdict, and that, consequently, the court erred in refusing to grant a new trial.

We are of the opinion that the verdict was not sustained by the evidence.

There was no evidence tending to show that the land was sold on a credit for a definite sum payable in instalments, and that the notes were transferred to the plaintiff as a mere security for the payment of the purchase-money. Nor was there any evidence tending to prove that the land was sold for any fixed price, or was of any estimated or specific value. Nor was anything testified to, or seemingly otherwise established, from which any difference between the value of the land and the value of the notes could have been inferred, or from which any specified sum in damages could have been fairly estimated.

As the evidence went to the jury, we are left in doubt as to whether the plaintiff was seeking only a partial rescission of his contract for the sale of the land, or to recover damages simply for the alleged fraud and deceit practiced upon him.

The case made by the complaint was, however, more in the nature of a rescission of the contract for the sale of the land than for the enforcement of a vendor's lien, and nothing was offered in explanation of the delay in bringing this suit.

It is a well recognized rule, that actions of the class to which

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this belongs must be brought with reasonable promptitude, after the discovery of the fraud complained of, and this is especially the case where the rights of third parties are likely to be injuriously affected by any want of promptitude in that respect. Relief is granted in such cases to the vigilant, and not to the negligent. *Patten v. Stewart*, 24 Ind. 332.

After a party has become aware of his right to rescind a contract for fraud, he can not continue to claim property acquired under the contract, as his own, and to exercise acts of ownership over it, without forfeiting his right of rescission. *Bigelow Fraud*, p. 441; *Barton v. Simmons*, 14 Ind. 49; *Dynes v. Shaffer*, 19 Ind. 165; *Sieveling v. Litzler*, 31 Ind. 13; *Stedman v. Boone*, 49 Ind. 469; *Krutz v. Craig*, 53 Ind. 561; *Moon v. Baum*, 58 Ind. 194.

Waiving, therefore, the further discussion of all other questions suggested by the evidence, we feel constrained to hold that the plaintiff, by the uses to which he put the notes, after he claims to have discovered that they were worthless, and his consequent long delay in commencing this action, forfeited all claim to the relief to which the averments of his complaint would seem to have entitled him.

The judgment is reversed, with costs, and the cause remanded for a new trial.

No. 9187.

TOWN OF RUSHVILLE v. POE.

NEGLIGENCE.—Town.—Defective Street.—Complaint for Personal Injury.—A complaint against a town for a personal injury, suffered by reason of a fall in the street, must show that the injury was caused by some specified act of negligence or omission of duty on the part of the town; and a charge that the town, while grading a street, caused the digging of a hole ten inches deep and twelve inches in diameter, which it negligently permitted to remain in the street for ten days, uncovered and unguarded,

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and that, while walking along the street, the plaintiff, without negligence on her part, stepped into the hole and was thrown down and injured, is insufficient.

SAME.—*Pleading.—Contributory Fault.*—A general averment, in a complaint for negligent injury, that the injury was suffered without fault on the part of the plaintiff, is sufficient.

From the Rush Circuit Court.

G. B. Sleeth, W. A. Cullen and B. L. Smith, for appellant.
J. J. Spann, J. Q. Thomas and C. Cambern, for appellee.

WOODS, C. J.—The appellee recovered a judgment for damages against the appellant upon a complaint containing the following averments:

“Martha Poe, plaintiff, complains of the town of Rushville, defendant, and says that, prior to the 21st day of November, 1879, the defendant was engaged in grading Jennings street in said town, and, while so engaged, caused a hole to be dug in said street ten inches deep and twelve inches in diameter; that plaintiff, on the evening of said 21st day of November, 1879, while walking along said street, stepped into said hole, and was thrown violently to the ground, thereby bruising her face and limbs and breaking her wrist; * * * that said hole was, through the negligence of defendant, permitted to remain in said street for ten days, and was left uncovered and unguarded, and said injuries were sustained without fault or negligence of plaintiff. Wherefore,” etc.

If good, the pleading would be a model of brevity. It is not good, because it does not show that the injury suffered was the result of the alleged negligence on the part of the town. That negligence is charged to have consisted, not in the opening of the hole, but in permitting it to remain for ten days; and perhaps, by fair, though a very liberal, construction, the averment may be said to mean that the excavation “was left uncovered and unguarded” during the time mentioned, but whether or not the plaintiff was hurt during that time is not alleged, and can not fairly be inferred. The plaintiff may have been injured on the day the excavation was

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made, and before it could be said that the town had been guilty of any negligence ; the street was in process of being gravelled, and may not have been open for public use ; or, at the time the excavation was made, proper safeguards may have been placed upon or about it, and these afterwards removed without the knowledge of the town, and the injury have befallen the plaintiff before the town had, or under the circumstances ought to have had, notice of the defect, and of the consequent danger.

Another objection is urged, namely : that the plaintiff's fall is not shown to have been caused by her stepping into the hole. She may have been falling when she made the misstep, and the hole may have neither caused the fall nor contributed to the injury.

The plain ground, however, on which we base our conclusion is that the injury is not alleged to have been caused by any specified negligent act or omission of duty on the part of the town, nor by any fair intendment may be attributed to the negligence which is charged.

The averment of freedom from fault on the part of the plaintiff is sufficient. *Town of Salem v. Goller*, 76 Ind. 291.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

No. 9929.

WHITEHEAD ET AL. v. MATHAWAY.

PRACTICE.—*Witness.—Question.—Exception.—New Trial.—Available Error.—*

Where an objection to a question put to a witness is sustained by the court, the party can not, by merely saving an exception to such ruling and assigning the same as cause for a new trial, get an error into the record which will be available for the reversal of the judgment. It must also appear that he stated to the trial court the evidence which he expected to elicit by the answer.

Whitehead *et al.* v. Mathaway.

ASSAULT AND BATTERY.—Civil Action.—Defence.—Contributory Negligence.—Evidence.—In a civil action for the recovery of damages for an assault and battery, the doctrine of contributory negligence has no application, and no defence can be predicated thereon; and the exclusion of evidence, tending to show that the plaintiff's negligence contributed to his injuries or damages, is not erroneous.

SAME.—Damages.—Where, in such action, it is shown that the plaintiff had received serious injury, \$150 can not be regarded as excessive damages.

From the Pike Circuit Court.

F. B. Posey and J. W. Wilson, for appellants.

E. A. Ely, C. H. Benton, A. H. Taylor and W. F. Townsend, for appellee.

Howk, J.—In this case the appellee sued the appellants, in a complaint of one paragraph, to recover damages for an assault and battery. The appellants answered by a general denial of the complaint. The issues joined were tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of \$150. Over the appellants' motion for a new trial, and their exception saved, the court rendered judgment on the verdict.

The overruling of their motion for a new trial is assigned as error by the appellants. On the trial the appellants asked a witness the following question: "When you saw the plaintiff a week or two ago, what was his condition as to sobriety or otherwise?" The appellee's objection to this question was sustained by the court, and the appellants excepted, and assigned the ruling as an error of law in their motion for a new trial as cause therefor. Of this cause for a new trial it is enough to say, we think, that a party can not, by saving an exception to the decision of the court in sustaining an objection to a question to a witness, get an error in the record which will be available to him for the reversal of the judgment. It must appear, also, that he stated to the trial court, clearly and explicitly, what the evidence was which he offered and expected to elicit by the answer of the witness to the question propounded. This much is due as well to the trial court as

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to this court, and, unless the record shows that such a statement of the offered evidence was made at the time, the supposed error of law, if it exist, can not be made available in this court. *Mitchell v. Chambers*, 55 Ind. 289; *Graeter v. Williams*, 55 Ind. 461; *Bake v. Smiley*, 84 Ind. 212. In the case at bar, the record fails to show that the appellants informed the trial court what evidence they offered and expected to elicit by the answer of the witness to the question to which an objection was sustained. The alleged error of law, of which they complain, is not properly saved in the record, therefore, and presents no question for the decision of this court.

By another witness, the appellants offered to prove on the trial, "that for two weeks immediately following the 8th day of January, 1881" (on which day the assault and battery was committed), "the plaintiff was, the whole time, drunk and intoxicated." The appellee objected to the offered evidence, on the ground that it was not competent, and because it was irrelevant, immaterial and outside of the issues in the case. The court sustained the objection, and excluded the offered evidence; and the appellants excepted to the ruling, and assigned the same as cause for a new trial in their motion therefor.

It is very clear, we think, that the offered evidence was outside of the issues in the cause, and was properly excluded on that ground. It is recited in the bill of exceptions, that the evidence was offered "for the purpose of showing that the plaintiff aggravated his injuries and prolonged the period of his recovery." This means, if we understand it, that the appellee, by his own negligence or want of proper care, had contributed to his injuries; in other words, it is an attempt to apply the doctrine of contributory negligence, as a defence, in an action to recover damages for an assault and battery. The evidence offered was not competent, and was properly excluded in this view of the case. In *Ruter v. Foy*, 46 Iowa, 132, the court said: "The doctrine of contributory negligence has no application in an action for assault and battery. There can be no contributory negligence except where the defend-

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ant has been guilty of negligence to which the plaintiff's negligence could contribute. An assault and battery is not negligence. The former is intentional; the latter is unintentional."

So, in *Steinmetz v. Kelly*, 72 Ind. 442 (37 Am. R. 170), this court recognized and acted upon the same doctrine. This court said: "An intentional and unlawful assault and battery, inflicted upon a person, is an invasion of his right of personal security, for which the law gives him redress, and of this redress he can not be deprived on the ground that he was negligent and took no care to avoid such invasion of his right." We are of the opinion that the offered evidence in this case was not competent evidence, for any purpose, and was correctly excluded on that ground. Its admission would have opened the door to the investigation of immaterial and irrelevant side issues, the determination of which either way could not have had any legitimate bearing upon the proper decision of the matters in issue in this case.

It is claimed that the damages assessed were excessive. It seems to us, however, that where it appears, as it does in this case, that two men committed an assault and battery on one, and broke his ribs by kicking him in the side, the sum of \$150 can not be regarded as excessive damages.

The court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

 No. 9795.

MOODY ET AL. v. SHAW, ADMINISTRATOR.

CONTRACT.—A written contract can not be varied or controlled by a contemporaneous verbal agreement.

DECEDENTS' ESTATES.—*Administrator's Sale of Real Estate.*—The purchaser of real estate at an administrator's sale takes the land subject to all encumbrances, unless the order of sale otherwise directs, and the legal effect of the contract can not be contradicted by a verbal contemporaneous agreement.

85	88
128	364

85	88
167	579

Moody *et al.* v. Shaw, Administrator.

SAME.—*Promissory Note.—Set-Off.—Taxes.—Promise of Administrator.*—To a suit by an administrator *de bonis non*, on a promissory note given for the purchase of land at an administrator's sale, an answer of set-off for taxes paid on the land by the defendant, at the request of the former administrator, is insufficient; the mere promise of the administrator being insufficient to bind the estate in the absence of facts showing the right to charge the estate, or that the consideration for the promise arose prior to the intestate's death.

From the Clay Circuit Court.

W. W. Carter, for appellants.

L. Shaw and *J. S. Bays*, for appellee.

ELLIOTT, J.—The appellee as the administrator *de bonis non* of the estate of Daniel G. Dixon, deceased, instituted this action upon two promissory notes executed to the former administrator by the appellants.

The first paragraph of the answer admits the execution of the notes, alleges that they were executed in part payment for land sold by the administrator for the payment of debts; that the land was encumbered by taxes to the amount of \$63.38; that prior to the sale the administrator agreed to pay them; that he failed to do so, and at the time of the execution of the deed, and at the time the notes sued on were executed, it was agreed between the appellants and the administrator that they should execute their notes for the purchase-money, and should pay the taxes, and, upon payment, receive credit therefor on the notes executed by them.

The answer is bad for the reason that it attempts to set up a verbal agreement in contradiction of the terms of the written instruments executed by the parties. The appellants, as purchasers at the administrator's sale, took the land subject to all encumbrances; for, unless the order of sale otherwise directs, all conveyances by administrators are subject to existing liens. They can not contradict the effect of the contract by a contemporaneous verbal agreement; for the legal effect of a contract can no more be varied by oral negotiations than can its express terms and stipulations.

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- There are other objections to this answer, but we do not deem it necessary to notice them.

The second paragraph alleges that the estate represented by the appellee is indebted to the appellants for taxes on land paid by them at the request of the former administrator, and offers to set off the amount paid by them against the notes sued on. This paragraph is bad for the reason that it does not state facts showing authority in the administrator to bind the estate. A mere promise made by the administrator will bind him personally, but not the estate, unless facts are stated showing the right to charge the estate, or that the consideration for the promise arose prior to the intestate's death. *Holderbaugh v. Turpin*, 75 Ind. 84 (39 Am. R. 124); *Mills v. Kuykendall*, 2 Blackf. 47; *Cornthwaite v. First Nat'l Bank, etc.*, 57 Ind. 268. There is nothing in the answer before us showing that the estate was liable for the taxes, or that the administrator had any right to charge the estate with their payment.

Judgment affirmed.

85 90
187 477

 10,520.

MOORE v. THE STATE.

CRIMINAL LAW.—*Questions of Fact.*—*Jury.*—It is the province of the jury alone to determine questions of fact in a criminal case.

SAME.—*Instructions.*—*Evidence.*—*Presumption.*—*Witness.*—When, in a criminal trial, there has been a conflict of testimony in reference to the time of an occurrence, it is error to instruct that it may be presumed that each witness spoke according to his own timepiece, and that the difference of opinion may be so explained.

From the Posey Circuit Court.

C. A. DeBruler, E. R. Hatfield and A. C. Pitcher, for appellant.

F. T. Hord, Attorney General, and W. A. Gudgel, Prosecuting Attorney, for the State.

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WOODS, C. J.—The appellant was convicted and sentenced to the State prison upon an indictment for robbery.

It is represented to us by counsel for the appellant, and not questioned or denied by the Attorney General, that since the conviction of the appellant the principal witness against him has confessed that his testimony was false, and, upon a plea of guilty, has been sentenced for the perjury to the State prison for the term of fourteen years; and that, upon these facts, the judge of the court below, the prosecuting attorney and others have joined in a recommendation that the judgment against the appellant should be set aside and annulled.

There is manifest error in the record, which requires the reversal of the judgment. In its instructions the court, which was at the time presided over by a judge *pro tempore*, among other things, said:

“There is no dispute about the fact that the great crime of robbery was perpetrated on the person of Doctor Spencer, on the night of the 28th day of January, 1881.

“Some of the witnesses have contradicted other witnesses, and you are to decide whom you will believe or disbelieve.

“There is some conflict of testimony upon the subject of time, and, as there is no evidence of any recognized standard of time for this city at the time of the crime, it may be presumed that each person estimated the time by his own particular timepiece; and this difference of opinion about time may have been caused by the difference of time indicated by different timepieces.”

Each of these instructions, and especially the last, was a clear invasion of the province of the jury, to which alone, when the trial is before a jury, it belongs to determine all questions of fact. *Jackman v. State*, 71 Ind. 149; *Canada v. Curry*, 73 Ind. 246; *Comstock v. Whitworth*, 75 Ind. 129.

Judgment reversed, and ordered that a new trial be granted, and that the prisoner be delivered to the custody of the sheriff of Posey county.

 Braden v. Graves.

No. 9292.

BRADEN v. GRAVES.

MORTGAGE.—*Res Adjudicata.*—*Decisions of Supreme Court.*—*Practice.*—*Conclusion of Law.*—*Exception.*—Where an action is brought to foreclose a mortgage in the form of a deed, and upon appeal to the Supreme Court it is held that the facts stated are sufficient to entitle the plaintiff to recover, such decision is binding upon the trial court and upon the Supreme Court on a second appeal, and if, upon a subsequent trial, the facts alleged are found and conclusions of law are stated, the defendant can not, by an exception to the conclusions, again raise such questions, as the decision of the questions, however presented, binds him.

SAME.—*Vendor's Lien.*—*Promissory Note.*—*Recitals.*—*Estoppel.*—Where, in such action, the defendant seeks by counter-claim to enforce a vendor's lien upon the land for the amount of a note alleged to have been executed by the plaintiff for the land, and the court finds that the note was executed without consideration and concludes that the defendant is not liable upon it, an exception to the conclusion of law raises no question as to whether the recitals in the note estop the plaintiff to prove such fact.

SAME.—*Subrogation.*—*Payment of Prior Mortgages.*—*Interest.*—In such action the defendant, who is the purchaser of the equity of redemption, and who has paid prior mortgages, bearing interest at the rate of seven and ten per cent., is entitled to the amounts paid upon such mortgages, with interest thereon from the time of payment at the rates specified in such mortgages.

SPECIAL FINDING.—*Exception to Conclusion of Law.*—An exception to the conclusions of law concedes, for the purposes of the exception, that the facts are correctly found.

From the Shelby Circuit Court.

T. B. Adams, L. T. Michener and G. M. Wright, for appellant.
O. J. Glessner, E. K. Adams and L. J. Hackney, for appellee.

BEST, C.—Albert G. Hanks and Eliza, his wife, executed a mortgage, in the form of an absolute deed, upon the premises in the complaint described, to the appellee. This mortgage was immediately recorded, but was junior to two judgments against said Albert G., which were liens, and upon which the premises were subsequently sold and conveyed to the appellant. The mortgagors, after its execution, also conveyed the premises to the appellant, after which Albert G.

85	92
126	488
85	92
128	54
85	92
130	17
85	92
133	510

Braden v. Graves.

died, leaving Eliza, his wife, surviving him. Thereupon the appellee brought this action against the appellant to foreclose the mortgage upon the undivided one-third of said premises. A demurrer was sustained to the complaint, and this ruling, upon appeal, was reversed by this court, *Graves v. Braden*, 62 Ind. 93; to which reference is made for a more detailed statement of the facts alleged in the complaint.

After the cause was remanded, among other pleadings, a counter-claim was filed by which the appellant sought to enforce a vendor's lien upon said premises, alleging that the appellee had executed a note to Eliza Hanks for the purchase-money, and that the same had been by her endorsed to him. He also alleged, that he had been compelled to pay two mortgages upon said premises, which were prior liens, and he sought to enforce such liens against the appellee. Issues were formed, a trial had, and the court found the facts specially, stated its conclusions of law thereon, and rendered final judgment accordingly. The appellant reserved exceptions to the conclusions of law, and in his brief relies alone upon these exceptions for a reversal of the judgment.

The court found the facts alleged in the complaint, and also found the following facts: "That the plaintiff executed to Eliza M. Hanks the following note:

"AUGUST 10th, 1867.

"On or before the 25th day of December, 1868, I promise to pay to Eliza M. Hanks two thousand and four hundred dollars, for value received of her, waiving valuation or appraisement laws of Indiana. The above note is given for real estate in the county of Shelby, and State of Indiana. If either party, or their administrator, become dissatisfied at the time of maturity of the note, the said C. C. Graves is to make back to the said Eliza M. Hanks a deed.

"C. C. GRAVES."

"The above note was, after the execution of the deeds by the sheriff and after the death of Hanks, endorsed in writing on the back thereof by Eliza M. Hanks to the defendant,

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Braden, without any consideration whatever, and the above note from Graves to Eliza M. Hanks was executed without any consideration whatever; and the said Graves had not purchased any land from said Eliza, or any other person, for which said note was given, and Braden has no right to recover thereon; that before the execution of the Graves mortgage, to wit, on the 6th day of August, 1867, Hanks and wife executed to Joseph D. Sidener their mortgage, whereby they mortgaged and warranted to said Sidener the above described eighty-acre tract of land to secure the payment, when the same became due, of two promissory notes made, by said Hanks to Sidener; one note dated July 1st, 1867, due five months after date, for \$451.50; and the other said note, for \$624, dated August 6th, 1867, due four months after date; and both to draw ten per cent. interest until paid, if not paid punctually at maturity; which mortgage was duly executed and acknowledged, and recorded in the recorder's office, in Mortgage Record 'G,' one of the proper records of said office, on the 6th day of August, 1867; that on the 5th day of February, 1870, for the purpose of protecting his title to said lands as conveyed him by said Hanks and wife, Braden paid off and satisfied said mortgage in full, by paying to said Sidener \$1,290.47, the full amount then due thereon, and said mortgage was properly endorsed of record as fully paid and satisfied by said Sidener.

"On the 2d day of October, 1858, Hanks and wife executed their certain mortgage to the State of Indiana upon the above described forty-acre tract of land; whereby they mortgaged and warranted to the State of Indiana the said land, to secure the payment of the sum of \$500, and seven per cent. interest therefor, which sum had been borrowed by Hanks from the sinking-fund of the State of Indiana.

"On the 25th day of September, A. D. 1871, for the purpose of protecting his title, Braden paid to the State of Indiana the amount due upon said mortgage, being \$541.50, and

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the said mortgage was then and there cancelled and satisfied of record, upon the proper records in the recorder's office of Shelby county.

“That plaintiff never at any time delivered or surrendered to defendant his mortgage or any interest therein; that plaintiff is and has been for fifteen years last past a non-resident of the State of Indiana, but a resident of the State of Kentucky, and has no property subject to execution in the State of Indiana.

“The note executed by Hanks to plaintiff is due and unpaid, and there is now due thereon the sum of \$601, collectible without relief from the valuation or appraisement laws of the State of Indiana, and the one undivided third part in value of the above described land is liable to be sold upon decree as lands are sold upon execution, to pay and satisfy the sum so found due upon said note; that defendant, Braden, by the payment of the Sidener mortgage, which was a prior lien upon the eighty-acre tract, and by the payment of the sinking-fund mortgage, which was a prior lien upon the forty-acre tract, to the mortgage of Graves, has the right to have said liens kept alive and on foot as between himself and plaintiff; that the one-third of the \$541.50 paid upon the sinking-fund mortgage, to wit, the sum of \$180.50, with interest at the rate of six per cent. thereon from September 25th, 1871, is a prior lien on the undivided one-third of the forty-acre tract of land described in the Graves mortgage, which sum must first be paid by Graves to Braden, or the said sum must first be paid to Braden out of the proceeds of the sale of said land; that the one-third of the \$1,290.47 paid by Braden upon the Sidener mortgage, to wit, the sum of \$430.16, with interest thereon at the rate of six per cent., from the 15th day of February, A. D. 1870, is a prior lien to the Graves mortgage upon the undivided one-third part in value of the eighty-acre tract of land, which sum must be paid by Graves to Braden, or the said sum must be paid to Braden out of the proceeds of sale of the said tract of land; that the relation of principal and

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surety in no manner existed between Graves and Braden, and hence Braden is not entitled to ten per cent. interest upon the sums stipulated in Sidener's mortgage, or seven per cent. as stipulated in the sinking-fund mortgage, and, as between himself and Graves, can only receive six per cent. interest upon the one-third of the amount paid out by him from date of payment."

The facts found do not show that the appellant had actual knowledge of the existence of the appellee's mortgage at the time he purchased and paid for the land, and the appellant insists that this mortgage was not recorded in the proper record, and for that reason the record was not constructive notice to him.

The facts found by the court upon this question are the identical facts averred in the complaint, and the appellant's exception to the conclusion of law raises the same question that was raised by the demurrer to the complaint. This question was decided by this court against the appellant upon the former appeal, and that decision concludes him upon such question. The rule is that "Where, upon appeal, the appellate court decides a question presented by the record, and the cause is remanded, the decision is binding both upon the court below and the appellate court, and can not be reversed upon a second appeal." *Sizer v. Many*, 16 Howard U. S. 98; *Hawley v. Smith*, 45 Ind. 183; *Dodge v. Gaylord*, 53 Ind. 365, and authorities there cited. The same rule prevails where the same question of law is raised in the subsequent proceedings, though the question is raised in a different way. *Roberts v. Cooper*, 20 How. 467.

In the above case, after the cause was remanded, the court was requested to instruct the jury contrary to the principles established on the first writ of error, and it was held that none of the questions thus decided could be heard and determined upon a second writ of error.

In the case at bar, this precise question in the former appeal was decided against the appellant, and that decision, though

the question was presented upon a demurrer to the complaint instead of an exception to a conclusion of law upon facts found, is the law of this case, and is binding alike upon the parties and upon the court. This point, therefore, can not be sustained.

The next point made is that the recital in the note made by the appellee to Eliza M. Hanks, and by her endorsed to the appellant, estops the appellee to show that it was made without any consideration. This question is not raised by an exception to the conclusion of law. A conclusion of law is based upon the facts found and raises no question as to the right of the party to prove the facts or of the court to find them. An exception to the conclusions of law concedes, for the purposes of the exception, that the facts have been correctly found, and the exception in this case is tantamount to an admission that the note was made without any consideration. *Robinson v. Snyder*, 74 Ind. 110.

If an objection to proof of this fact had been overruled, an exception saved, and the ruling made the ground of a motion for a new trial, the question would have been presented; but an exception to the conclusion of law does not present it, and, therefore, we decide nothing concerning it.

The next position taken is that the appellant is entitled to interest upon the amounts paid upon the Sidener and the sinking-fund mortgages, from the time such payments were made until such sums are refunded, at the rate of interest specified in said mortgages, respectively. This position is based upon the assumption that the payment of these mortgages, under the circumstances stated, entitles the appellant to be subrogated to the rights of the mortgagees, and enables him to treat them as subsisting liens equitably assigned to him. This position seems to us to be well taken. Jones on Mortgages, sec. 877, says that, "When a mortgage is paid by one who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property, and holds the

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title so acquired as against subsequent incumbrances, although he had also acquired the equity of redemption. In such case no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. His payment of the mortgage and his relation to the estate are in aid of his title to strengthen and uphold it." The rule thus announced has been repeatedly asserted by this court. *Muir v. Berkshire*, 52 Ind. 149; *Holten v. Board, etc.*, 55 Ind. 194.

If a party, thus paying the mortgage, is subrogated to the rights of the mortgagee, it follows that he is entitled to the money thus paid, with interest at the rate specified in the mortgage. This was expressly so decided in *Walker v. King*, 45 Vt. 525, in a case precisely similar to this one, and we can not see how it can otherwise be decided if the mortgage is to be regarded as a subsisting lien for the amount of money paid. This, of course, proceeds upon the assumption that the mortgagee would have been entitled to interest at such rate upon such sum. If any part of the sum thus paid is interest, the person who makes the payment can recover no more than the mortgagee could have recovered had no payment been made. The suggestion of the appellee, that the allowance of interest at the rates claimed would be inequitable, is met by the fact that the appellee had the right to redeem by paying the amounts paid upon these mortgages, with interest at the rates specified, and the right to carry such liens, at such rates of interest until he could be reimbursed from the property, or until his claims should be paid. We are, therefore, of opinion that the court erred in concluding that the appellant was not entitled to interest at ten per cent. upon the amount paid upon the Sidener mortgage, and seven per cent. interest upon the amount paid upon the sinking-fund mortgage; and that the judgment should be reversed, with instructions to state conclusions of law in accordance with this opinion, and to render judgment thereon accordingly.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed, at the

Franklin v. The State.

appellee's costs in this court, with instructions to state conclusions of law in accordance with the above opinion, and to render judgment thereon accordingly.

No. 10,237.

FRANKLIN v. THE STATE.

85	99
171	667

CRIMINAL LAW.—*Malicious Trespass.—Injuring Toll-Gate.—Affidavit.*—An affidavit, in a prosecution for injuring a toll-gate of a turnpike company, is not insufficient because the affiant swears to the statements therein from information and belief.

SAME.—*Evidence.—Corporation.*—In such prosecution, it is not necessary for the State to prove the organization of such company; it is sufficient to show that it was known and recognized as a turnpike company and was operating the turnpike on which the gate was situated.

SAME.—The fact that the gate-keeper refused to allow the defendant to pass through the gate, although he may have paid the toll at another gate, did not authorize him to destroy the company's property.

From the Madison Circuit Court.

J. W. Sansberry, M. A. Chipman and ——— *Sansberry*, for appellant.

F. T. Hord, Attorney General, and *W. A. Kittinger*, Prosecuting Attorney, for the State.

ELLIOTT, J.—This is an appeal from a judgment of conviction of the offence of malicious trespass in destroying a toll-gate.

It is said that the affidavit is insufficient, because the affiant swears from information and belief and not from actual knowledge. We think that it is not necessary that the affidavit should show that the statements contained in it are made from affiant's knowledge, but that it is sufficient if it appears that they were made upon information and belief. *State v. Buxton*, 31 Ind. 67; *Curry v. Baker*, 31 Ind. 151; *State v. Ellison*, 14 Ind. 380; *Simpkins v. Malatt*, 9 Ind. 543.

Dickey v. Tyner *et al.*

It was not necessary for the State to prove the organization of the turnpike company, whose gate was destroyed; for no more was required of the State than that it be shown that the company was generally known and recognized as a corporation and was in possession of and operating the turnpike on which the gate was situated. *Norton v. State*, 74 Ind. 337; *Johnson v. State*, 65 Ind. 204; *White v. State*, 69 Ind. 273; *Lowe v. State*, 46 Ind. 305.

There is evidence tending to show that the turnpike was in reasonably good repair, and as the verdict is against the appellant upon this question, as upon all the other material questions in the case, we can not re-examine this question of fact for the purpose of ascertaining whether the conclusion of the jury was or was not the correct one.

The appellant insists that he had a right to destroy the gate, because he had paid his toll at another gate, and the keeper of the one destroyed refused to permit him to pass without again paying toll. The mere fact that the gate-keeper refused to allow him to pass did not authorize him to destroy the company's property. *State v. Brumfiel*, 83 Ind. 136. But it appears that the keeper at the first gate offered him a ticket which would have enabled him to pass the second, but he refused to take it, and attempted to get through without either ticket or money, and in this was guilty of a wrong, and he can not, of course, use his own wrong as an excuse for the destruction of another's property.

Judgment affirmed.

No. 9193.

DICKEY v. TYNER ET AL.

MISTAKE.—*Decedents' Estates.*—*Settlement with Administrator.*—*Negligence.*—*Equity.*—Equity favors the diligent and will not afford relief from a mistake made in a settlement with an administrator, to a party who,

Dickey v. Tyner et al.

besides his negligence at the time of the mistake, offers no explanation of his failure to discover it before the final settlement of the estate and discharge of the administrator.

SAME.—Setting Aside Final Settlement.—It is not good ground for setting aside a final settlement of an estate that, by mistake, the administrator had collected of a debtor the full amount of his note, a credit endorsed on the note having been overlooked—no reason being shown why the mistake could not have been discovered before the final settlement.

SAME.—Liability of Heirs.—One who, by mistake, fails to get the benefit of a credit endorsed upon a note held against him by an administrator, and does not discover the fact until after final settlement of the estate, has no cause of action against the heirs or distributees of the estate.

From the Tipton Circuit Court.

R. B. Beauchamp and *G. H. Gifford*, for appellant.

R. Vaile and *J. F. Vaile*, for appellees.

WOODS, C. J.—The circuit court sustained a demurrer, for want of facts, to both paragraphs of the appellant's complaint, and gave judgment for the appellees.

The facts stated in each paragraph are, in substance, that in November, 1871, James V. Cox died testate, the appellees, except Tyner, who was named in the will as executor, and qualified as such, being the widow and children and legatees, to whom the estate was devised; the testator and the appellant had had extensive dealings with each other, which remained unsettled, evidenced in part by book accounts, and in part by promissory notes, which the testator held against the appellant to the number of twenty or more; that, in January, 1874, the appellant and the executor settled, or attempted to settle, and in the attempted settlement the appellant was found indebted to the estate in the sum of \$4,024.48; that the notes aforesaid were included in this settlement, and by reason of their being all pasted together at one end, a credit of \$500, endorsed on one of them, was concealed and overlooked, and that note entered into and was counted in the settlement against the appellant for the sum of \$703, when in fact there was only due and unpaid the sum of \$15; that said note had been inventoried for its full amount, and the mistake so made

Dickey v. Tyner *et al.*

in the settlement was carried into the current report next thereafter made by said executor, and thence into his final settlement of the estate, which was made in September, 1878; that at that settlement the surplus of the estate, which was greater than it ought to have been by the amount of the mistake, was distributed to the widow, children and legatees named as defendants; that the appellant did not discover said mistake until after the final settlement of the estate had been made; that he had no book account or other means in his power to enable him to discover the amount due from him to the estate at the time of said settlement with the executor, and that as soon as he discovered the mistake he at once brought his action to enforce his claim and to set aside the final settlement of the estate.

The prayer of the second paragraph is, not to set aside the settlement and open the estate, but to recover the amount of the over-payment of the legatees and distributees, who are made defendants, and are alleged to be possessed of the estate.

It is plain that the facts averred are not sufficient to entitle the appellant to recover directly against the heirs or legatees under the second count; R. S. 1881, sections 2442, 2453; and if the appellant has any remedy it must be under the first paragraph. The question presented is, whether the facts stated show a mistake for which the final settlement of the estate can and should be set aside.

The objection is made, that the complaint does not show that the sum for which the credit was endorsed on the note was actually paid, and that unless it was in fact paid it was proper that the endorsement should have been disregarded. The averment is made, however, that there was due and unpaid upon the note only \$15; while it was counted against the appellant for the full amount. This meets the objection, and shows that an error was committed to the injury of the appellant.

The 116th section of the act for the settlement of decedents' estates, which was in force when this suit was tried, contains

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the provision that any person interested in an estate which has been settled, may have the "settlement set aside for mistake or fraud, at any time within three years after said settlement."

It is insisted that the mistake shown in this case was not a mistake in the final settlement within the meaning of the provision quoted, but constituted only a claim against the estate which, under the authority of *Bell v. Lewis*, 44 Ind. 129, was lost, because not presented as such before the final settlement of the estate had been declared.

Passing by the questions thus suggested, and conceding, for the sake of the argument, that the alleged mistake was within the scope of the statute, we are of opinion, upon the facts stated, that the appellant's negligence was such as justly to debar him from asking to have the settlement opened and corrected. Notwithstanding the averment that he had no book entries or other means to enable him to know the amount of his liability to the estate, the notes themselves were present, it must be presumed, when the settlement between him and the executor was made, and should have been examined for the discovery of endorsements. An ordinarily prudent man, under ordinary circumstances, would not have failed in this respect; but, if this should be regarded as excusable negligence, there remains the fact that the estate remained unsettled for four years after the mistake occurred, and the discovery was not made until eighteen months or two years later. How the discovery was then made, and why, by proper diligence, it might not just as well have been made sooner, is not explained. Equity does not favor those who are thus negligent of their interests. See 1 Story Eq. Jur., section 146; *Peyton v. Kruger*, 77 Ind. 486.

Good policy certainly requires that the final settlement of an estate should not be disturbed on account of alleged mistakes, unless the applicant shows himself to have been reasonably diligent.

Judgment affirmed.

Duncan *et al.* v. The City of Terre Haute.

No. 9477.

DUNCAN ET AL. v. THE CITY OF TERRE HAUTE.

85	104
136	500
85	104
148	629

HUSBAND AND WIFE.—*City.*—*Donation of Land for Street by Husband Bars Wife's Interest.*—*Acceptance.*—A donation or grant of land by a husband, during life, to a municipal corporation for use as a street, noted as such on the plat of the city or an addition thereto, made in accordance with the statute, R. S. 1881, sec. 3374 *et seq.*, and accepted by the city, bars the inchoate interest of his wife in such land.

From the Vigo Circuit Court.

C. F. McNutt, S. C. Davis and S. B. Davis, for appellants.
I. N. Pierce and T. W. Harper, for appellee.

COOMBS, J.—This action was originally commenced by John Duncan, but before any proceedings were had he died, and his widow, Mary J. Duncan, and his three children were substituted as plaintiffs, and thereupon the said Mary J. Duncan filed her cross complaint against the city and her co-plaintiffs, alleging, in substance, that on the 17th of February, 1872, John Duncan, who was then her husband, was the owner in fee of a part of out-lot No. 65, of the original out-lots in said city of Terre Haute, describing it; that said John Duncan on that day made, acknowledged and caused to be recorded in the recorder's office of Vigo county, a plat of said land as an addition to said city of Terre Haute, and thereby dedicated, as and for the purpose of a street, thirty feet off of the north side, and along the entire length of said lot; that said John Duncan died, leaving her, his widow, and three children, his only heirs at law; that she did not join with her husband in said dedication, or in any conveyance of said land, during the lifetime of her said husband, and that she is the owner of one undivided third part of said thirty feet off of the north side of said lot, and along the entire length thereof, in fee simple; and that said city is entitled to an easement, as of a street, in the undivided two-thirds, the residue of said strip or parcel of land, and that her co-plaintiffs, William, Samuel and John Duncan, as the heirs of John Duncan, deceased, are the owners

Duncan et al. v. The City of Terre Haute.

of the fee in reversion ; that the city of Terre Haute is claiming, adversely to her, the easement and right of a street upon, in and over the whole of said strip of land, denying and ignoring the plaintiff's right therein and thereto. Prayer that her title may be quieted, and for a partition of said land.

A demurrer to this complaint was overruled, and the defendant answered the cross complaint in two paragraphs, the first in denial.

" 2d. The defendant, for a second and further answer to said cross complaint, says, that, on the 17th of February, 1872, the husband of the plaintiff herein, John Duncan, executed and acknowledged a plat of that part of out-lot sixty-five, owned by him, and on the same day caused the plat to be recorded in the recorder's office of Vigo county, Indiana ; that the land so owned and platted is the same described in the cross complaint of the plaintiff ; that, upon the execution and recording of the plat aforesaid, the city of Terre Haute accepted said dedication, and the said John Duncan ceased to pay taxes upon that part so dedicated as and for streets and alleys upon said plat ; that the part of the street which the plaintiff herein asks partition of is upon said plat laid off, marked and designated as College street, is thirty feet in width, and that said John Duncan owned all the lands upon the south line of said street, between Sixth and Seventh streets, in the city of Terre Haute ; and that upon said plat the said John Duncan marked off and dedicated thirty feet, as and for the purpose of extending College street through from Sixth to Seventh streets, the other thirty feet, necessary to make said College street of one uniform width, being thirty feet off of the south side of the lands lying north of the property owned by John Duncan, being given and dedicated to the public by Richard Straut, the owner of said lands ; that said John Duncan opened all of the streets and alleys upon his said plat designated and dedicated, excepting thirty feet fronting on Sixth street, in said city, and extending back along the line of College street one hundred and ninety-eight feet, said land

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lying and being upon the north side of the land owned by the said John Duncan, and being the thirty feet of land of which the plaintiff demands partition; that the streets and alley as platted by the said John Duncan, in his subdivision, compared exactly with the streets and alleys in all the subdivisions adjoining the subdivision of said Duncan."

Other matters are set forth in this answer by way of estoppel *in pais*, which, under the view we take of this case, need not be considered.

The plaintiff demurred to the second paragraph of the answer, for want of facts, which was overruled by the court, and proper exceptions taken, and the plaintiff, refusing to reply to said answer, elected to stand by her demurrer, and judgment was thereupon entered against her. The sufficiency of this answer depends upon the question whether a donation or grant to the public, noted as such on the plat of a town, or an addition to a town, made in accordance with the statutes of 1852 (1 R. S. 1876, p. 897), and accepted by the town, bars the dower of the wife of the donor, or rather the provisions made for the wife in lieu of dower.

The answer avers that John Duncan, the husband of the appellant, in his lifetime, made, acknowledged and caused to be recorded, a plat of the ground owned by him, as an addition to the city of Terre Haute, showing the dedication of the land for a public street, which was accepted by the city. No objection is made to the correctness of this plat or the dedication of the ground.

The courts of this country seem to have uniformly held, when the question has come before them, that when lands are appropriated by the exercise of eminent domain, or what is said to be equivalent to it, the dedication of lands to public use, the dower of the wife is defeated. *Guynne v. City of Cincinnati*, 3 Ohio, 24 (17 Am. Dec. 576); *Moore v. Mayor, etc.*, affirmed in the court of appeals, 8 N. Y. 110; *Jackson v. Edwards*, 7 Paige, 386; 1 Scribner Dower, p. 550 to 555. Dillon, in his treatise on Municipal Corporations, 2d ed., section

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459, says: "As dower is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the Legislature to authorize lands to be taken by a municipal corporation for a market, street, or other public use, upon an appraisement and payment of their value to the husband, the holder of the fee, and such taking and payment will confer an absolute title divested of any inchoate right of dower. Nor is a widow dowable in lands dedicated by her husband in his lifetime to the public, where the dedication is complete or has been accepted and acted upon by the municipal authorities."

Washburn, in treating of the various modes in which dower may be defeated, says: "One mode in which dower may be defeated remains to be mentioned, and that is, by the exercise of eminent domain during the life of the husband, or, what is equivalent to it, the dedication of land to the public use." 1 Washb. Real Prop., 4th ed., p. 269.

In *Moore v. City of New York*, 4 Sandf. 456, the court, in speaking of a former decision says: "We then held that the wife's right of dower was merely inchoate during the life of the husband, and that she had no vested or certain interest in his lands. The right being merely an incident to the marriage relation, it seems to us that while this right is thus inchoate, and before it has become vested by the death of the husband, any regulation of it may be made by the Legislature, though its operation is in effect to divest the right; the marriage relation itself being within the power of the Legislature to modify, or even abolish it."

The second section of the act of 1852, 1 R. S. 1876, p. 897, provides that "Every donation or grant to the public, or to any individual, religious society, corporation or body politic, noted as such on the plat of the town wherein such donation or grant may have been made, shall be considered a general warranty to the said donee or grantee, for the purposes intended by the donor or grantor." What effect such a donation to an individual, etc., would have upon this question

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of dower, we do not decide, the question not being before us. The precise question involved in the case at bar has never come before this court, but it has been repeatedly held that while dower is inchoate it may be regulated or abolished by the Legislature. *Noel v. Elwing*, 9 Ind. 37; *Strong v. Clem*, 12 Ind. 37.

In *Gimbel v. Stolte*, 59 Ind. 446, this court held that when a city has condemned real estate for street purposes, and has paid the owner therefor, it takes the property, for such purposes, discharged from the lien of previous judgments. We have been referred to no decisions or text-books conflicting with the above authorities, and we have found none. We think the facts set forth in the second paragraph of the defendant's answer a bar to the suit, and that no error was committed in overruling the demurrer thereto.

The judgment is affirmed, with costs.

85	108
131	196
85	108
150	101

 No. 9722.

GREGORY ET AL. v. VAN VOORST, AUDITOR.

MARRIED WOMAN.—*Contract.*—*Mortgage.*—*Separate Real Estate.*—A complaint by a married woman to annul a mortgage made by her of her separate real estate, her husband joining, while the act of March 25th, 1879, was in force, which does not show the mortgage to be such as was prohibited by that act, is bad on demurrer.

SAME.—*Foreclosure of Mortgage Against Wife's Land.*—*Promissory Note.*—A mortgage by a married woman, her husband joining, of her lands acquired by gift, devise or descent, to secure a loan made by her, may be enforced if the debt be identified in the mortgage, though a note for the money made by her is void as a personal obligation. *Brick v. Scott*, 47 Ind. 299, distinguished and questioned.

SPECIAL FINDING.—*Exception to Conclusions of Law.*—An exception to the conclusions of law admits that the facts are fully and correctly found.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellants.

M. M. Sill, *T. F. Palmer* and *J. H. Wallace*, for appellee.

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BICKNELL, C. C.—The appellants brought this suit against the appellee, demanding that a certain note and mortgage be declared invalid, and that the appellee, the county auditor, be restrained from selling the mortgaged premises.

There was an amended complaint in three paragraphs. To the first and second of these paragraphs demurrers were sustained; to the third a demurrer was overruled. The defendant answered the third paragraph by a general denial and a special plea, to which plea the plaintiffs replied in denial.

The issues were tried by the court, who made a special finding of facts, to wit:

1. The plaintiffs have been husband and wife since the year 1867.

2. The defendant was auditor of White county, etc.

3. Margaret Gregory became the owner of the mortgaged premises in 1877; a lot she had owned in Monticello went in part payment therefor; the remainder of the purchase-money her husband paid; her lot was worth \$1,500; the value of the mortgaged premises was \$2,000; the price paid therefor was the said lot and \$455, paid by her husband.

4. Margaret had received by descent \$700, with which said lot in Monticello had been bought; the deed therefor had been made to her husband; then the plaintiffs conveyed the lot to the husband's brother, and he conveyed it to Margaret; the only purpose of these conveyances was to vest the title to the lot in Margaret; there was no consideration paid therefor.

5. In order to procure a loan of the public money, the plaintiffs, in July, 1879, executed the mortgage in suit, and the wife executed her note for the amount secured by the mortgage; this mortgage and the note, with the recorder's certificate, and an abstract of title, an affidavit of the wife that she was the owner of the lands, etc., and the certificate of the acknowledgment of the mortgage, were all on the same sheet of paper, and were simultaneously delivered to the county auditor.

6. The mortgage was to the State of Indiana, for the pay-

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ment of \$335, with interest at eight per cent. per annum, in advance, "according to the terms of the note hereunto annexed;" and the note was payable July 1st, 1884, with interest at eight per cent. per annum, in advance, with a proviso that, upon default in any payment of interest, the principal sum should be due, with two per cent. damages, and that the mortgaged premises might be sold by the county auditor forthwith, to pay principal, interest, damages and costs.

7. Upon the delivery of said writings to the county auditor, he drew his warrant on the county treasurer for the amount of said note and mortgage, less one year's interest and the costs of making the loan, and Robert Gregory, the husband, without objection from his wife and, presumably, with her consent, received the money on said warrant. Robert had applied to the auditor for such a loan, but the loan was made solely on the execution and delivery of the aforesaid writings, and there was no agreement or contract for any other loan.

8. At the time of the loan the wife was not carrying on any trade or business, or performing any labor or service on her separate account, and she did not execute the note or mortgage for the improvement of her real estate.

9. Nothing has been paid upon said note and mortgage; one year's interest, due in advance, on July 1st, 1880, is in default, and when this suit was brought the county auditor had given notice of such default, and was about to sell the mortgaged premises according to law.

Upon the foregoing facts the court stated conclusions of law as follows:

"1. The mortgaged premises were the separate property of Margaret Gregory, acquired by descent and gift.

"2. The debt secured by the mortgage was not the debt of Robert Gregory.

"3. Said debt was the debt of Margaret Gregory.

"4. Said mortgage, thus taken by a public officer, on a loan of public funds, is valid.

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“5. That the plaintiffs are not entitled to recover on the facts found ; therefore, the finding is for the defendant.”

To these conclusions of law, the plaintiffs at the time excepted. The plaintiffs moved for a new trial, and filed the following reasons therefor:

1. The finding is not sustained by sufficient evidence.
2. The finding is contrary to law.

This motion was overruled ; judgment was rendered for the defendant, and the plaintiffs appealed.

The errors assigned are :

1. Sustaining the demurrer to the first paragraph of the amended complaint.
2. Error in the conclusions of law.
3. Overruling the motion for a new trial.

The first paragraph of the amended complaint states the marriage of the plaintiffs ; the execution of the note by the wife ; the execution of the mortgage by both of them to secure the payment of said sum of money, and for no other purpose ; that the mortgaged premises were the separate property of the wife, and that the money obtained upon the mortgage was not used to improve, or in any way to better said property ; that said plaintiff Margaret is in default as to one payment of interest on said loan, and that said VanVoorst, as auditor, is threatening to sell the mortgaged premises. This paragraph prays that VanVoorst be restrained from selling, and that said note and mortgage be declared of no effect, and that the plaintiffs have all other proper relief. Copies of the note and mortgage are annexed to and made part of the complaint.

The note promises to pay to the State of Indiana, for the use of the inhabitants of township 26, range 6 west, and township 27, range 3 west, on or before July 1st, 1884, the sum of \$335, with interest at the rate of 8 per cent. per annum, in advance, commencing July 1st, 1879 ; and agrees that, on failure to pay any interest, the principal shall become due, with two per cent. damages, and that the mortgaged premises may

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be forthwith sold by the county auditor for the payment of said principal, interest, damages and costs.

The mortgage is to the State of Indiana, for the use of the inhabitants of said townships, upon certain real estate in White county, Indiana, "for the payment of \$335, with interest at 8 per cent. in advance, according to the conditions of the note hereunto annexed," and is dated July 1st, 1879; the note is signed by the wife only; the mortgage is executed by the husband and wife.

The act of March 25th, 1879, in force at the date of these transactions, provided, in substance, as follows:

Sec. 2. A married woman may carry on any trade or business, and perform any labor or service for her sole and separate account.

Sec. 3. A married woman may enter into any contract in reference to her separate trade, business, labor or service, and the management and improvement of her separate real property.

Sec. 4. No conveyance or contract by a married woman for the sale of her lands, or any interest therein, other than leases for three years or less, and mortgages for purchase-money of such lands, shall be valid unless her husband shall join therein.

Sec. 10. A married woman shall not mortgage or in any manner encumber her separate property acquired by descent, devise or gift, as a security for the debt or liability of her husband or any other person.

The first paragraph of the complaint does not show that the mortgage was invalid under any of the foregoing provisions. It does not state that the mortgage was not entered into in reference to the management and improvement of the wife's separate property; it merely states that "the money, derived as aforesaid, was not used to improve or in any way better said real estate."

It does not state that the property was acquired by descent, devise or gift, nor that the debt secured was the debt of the husband or some other person. It does not state that the

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mortgage was not given to secure the purchase-money of the mortgaged lands. Said first paragraph of the complaint does not state a mortgage void under any then existing statute or law.

In *Brick v. Scott*, 47 Ind. 299, where a married woman made a note and joined her husband in a mortgage of her separate real estate to secure the note, without any express agreement in the mortgage to pay the money, and without any description or identification of a debt secured by the mortgage, except the reference to the note, it was held that the woman's note was void, and that there could be no personal judgment against the woman or her husband, and no foreclosure of the mortgage; this was in 1874. As the law then stood, a married woman might join her husband in mortgaging her separate property to secure his debts. *Philbrooks v. McEwen*, 29 Ind. 347.

Said first paragraph states a note made by a married woman, and a mortgage by her and her husband of her separate real estate to secure a specified sum of money; the mortgage contains no express agreement to pay the money, but it does contain a sufficient description and identification of the debt to be paid. The court below, therefore, committed no error in sustaining the demurrer to the first paragraph of the complaint.

The third assignment of error is not discussed in the appellants' brief, and is, therefore, regarded as waived.

The only remaining assignment of error is the second, viz., that the court erred in its conclusions of law.

The only question here arising is, did the court properly apply the law to the facts stated in the special findings? An exception to the conclusions of law admits that the facts are fully and correctly found. *Cruzan v. Smith*, 41 Ind. 288.

The principal facts found are, that the wife held the property by descent and by gift; that, in order to procure a loan of public money from the county auditor, the husband and wife executed the mortgage, and the wife made her note; that the

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mortgage, by its terms, was "for the payment of \$335, with interest at the rate of eight per cent."; that said note and mortgage were delivered to the county auditor, who drew his warrant upon the county treasurer for the sum named in the mortgage, less a year's interest and costs, on which warrant the husband, with the wife's consent, received the money; that nothing has been paid upon the mortgage; that a year's interest in advance fell due on July 1st, 1880, and has not been paid, and that the principal sum mentioned in the mortgage has become due.

Upon these facts the general conclusion of law was that the mortgage ought not to be declared void, and that the county auditor ought not to be restrained from foreclosing it.

Under the act of 1852, 1 R. S. 1876, p. 550, sec. 5, the wife's power to encumber her separate real estate by a deed in which her husband joined was unlimited. In this particular her powers, by the act of March 25th, 1879, *supra*, are restrained; while in other respects they are enlarged.

In this case, the husband and wife joined in the mortgage. The special finding shows that the wife was not carrying on any trade or business, or performing any service or labor, and that the contract was not in reference to the management and improvement of the wife's separate real estate; so that it was not a case where the wife's contract would have been valid without the husband joining therein.

Then the question arises, was it forbidden by section 10 of the act of 1879, *supra*? That section forbids a wife to encumber her separate property acquired by descent, devise or gift, as a security for the debt of her husband or any other person. The property here being held by descent and by gift, the mortgage was void under section 10 aforesaid, if the debt secured thereby was the debt of the wife's husband, or of any third person; but, if the mortgage was to secure the wife's own debt, it was not forbidden by section 10, *supra*, and it was valid under section 4, *supra*, because her husband joined in it. The court stated, in its conclusions of law, that the debt

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secured by the mortgage was not the debt of the husband, and was the debt of the wife; and that such a mortgage was valid.

The facts found sustained these conclusions. The note of the married woman was void, not being given for any of the matters upon which a wife's rights are enlarged by the act of 1879; but the special finding shows that the credit was given to the wife, that the money was lent on the security of her separate real estate only, that there was no other contract for loan, and that the husband was permitted to receive the money by consent of his wife. Here, therefore, was not a mortgage for the debt of any other person; it was for the wife's own debt.

The appellants claim that the mortgage was void, and cite the case of *Brick v. Scott, supra*, to show that where the note is void the mortgage can not be foreclosed, unless it contains an express stipulation to pay the debt; but the case cited does not go to that extent. It decides that where there is a mortgage securing a note, and the note is void, there can be no personal judgment against the mortgagor, unless there is an agreement in the mortgage to pay the debt. It decides, also, that there can be no foreclosure of such a mortgage, unless it contain either an express agreement to pay the debt, or else a sufficient description and identification of the debt. So in *Philbrooks v. McEwen*, 29 Ind. 347, this court said: "A mortgage must somehow describe and identify the indebtedness: which it is intended to secure. * * * This description is not a covenant." *Buell v. Shuman*, 28 Ind. 464. The want of an express agreement in the mortgage, and in a valid writing thereby secured, to pay the debt, will prevent a personal judgment against the mortgagor; but if the mortgage sufficiently describes and identifies the indebtedness, it may be foreclosed as to the property, although there be no express covenant to pay the debt, either in the mortgage or in any collateral instrument. *Layman v. Shultz*, 60 Ind. 541.

The mortgage under consideration contained the following statement:

"We, Margaret Gregory and Robert Gregory, mortgage to

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the State of Indiana the following tract of land," etc., "for the payment of \$335, with interest at the rate of eight per cent. per annum, payable in advance," etc.

Here, no covenant to pay the debt is expressed in the mortgage, but there is a sufficient description and identification of the debt to warrant the foreclosure of the mortgage, although there can be no personal judgment.

If the mortgage had merely stated that it was given to secure a certain note, without any statement of the debt, except the reference to the note, a different question would have arisen; but here the mortgage ascertained the indebtedness.

There was, therefore, no reason why the mortgage should not be foreclosed. The court did not err in its conclusions of law; the judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

WOODS, C. J., concurs in the conclusion, but not on the ground that the mortgage identifies the debt which it was given to secure. On the contrary, it is shown that there was no debt, because a married woman could not, as the law then was, bind herself by a promise, either express or implied, to repay money loaned to her. It was, however, competent for her to join her husband in making a mortgage to secure the repayment of the money so obtained for her use, and the note signed by her, though void as a personal obligation, is so connected with and referred to in the mortgage, as to be a part of it, and to show when the money was to be paid, with what interest, etc., and the mortgage should be deemed to bind the land for such payment, although it contains no stipulation for a valid personal obligation against any one.

If *Brick v. Scott*, 47 Ind. 299, is inconsistent with the validity of such a mortgage, as it seems to be, it ought to be overruled. There was just as clear an identification of the debt in that case as in this, and, therefore, the cases can not be distinguished on that ground.

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No. 9868.

BUMGARDNER v. EDWARDS, TRUSTEE, ET AL.

85	117
146	84
85	117
149	422

PARTITION.—*Descents.—Widow.—Conveyance.—Statute Construed.—Husband and Wife.*—A woman, married a second time, holding by descent an undivided third of the lands of a former husband, may, without suit, make fair partition with the children of her former husband, and deeds executed by her and her second husband, to carry out such partition, are not an alienation prohibited by section 2484, R. S. 1881, as it stood prior to its amendment in 1879; and after such partition, and possession taken by the parties, she ceased to own any interest in the lands allotted to the children of the former husband.

From the Benton Circuit Court.

S. P. Thompson and *D. Smith*, for appellant.

H. W. Chase, *F. S. Chase*, *F. W. Chase* and *M. H. Walker*, for appellees.

BLACK, C.—The appellant, Celinda Bumgardner, wife of David Bumgardner, brought suit in December, 1879, for the partition of a tract of land, being one hundred and twenty-six acres, in Benton county, in this State, claiming to be the owner in fee simple of the undivided one-third thereof, her title to which she sought to have quieted, alleging that while holding said interest in said real estate in virtue of her marriage with John J. French, deceased, she had united with her second husband, said David Bumgardner, in a deed purporting to convey it to William W. Parker and Nancy I. Parker, his wife. Said Parkers were made defendants. Jonathan Edwards, The Equitable Trust Company, of Hartford, Connecticut, and Jonathan Edwards, as trustee of said Equitable Trust Company, were also made defendants, it being alleged that they claimed some interest adverse to the plaintiff, by reason of certain mortgages made by said Parkers, and the foreclosure thereof.

There were other defendants, as to whom no action was taken, and they are not parties to this appeal. They need not be further mentioned.

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The defendant Jonathan Edwards filed an answer, which is not in the transcript.

Jonathan Edwards, as trustee for said Equitable Trust Company, and said company, filed an answer of general denial, and a cross complaint against the plaintiff and the defendants Parker and wife, and also making defendants to the cross complaint Elizabeth Totheroh and Daniel Totheroh, her husband. Interrogatories were filed with the cross complaint, and the appellant answered them under oath. Appellant demurred to the cross complaint, for want of sufficient facts. The demurrer was overruled. Appellant then filed her answer to the cross complaint. The plaintiffs in the cross complaint demurred to the answer thereto. The demurrer was sustained; and appellants, for a second paragraph of answer to the cross complaint, filed a general denial. The defendants Elizabeth Totheroh and Daniel Totheroh answered the cross complaint, disclaiming all interest in the lands mentioned therein. The Parkers were defaulted.

The cause was tried by the court, an agreed statement of facts, made part of the record by order of the court, being submitted to the court as the evidence.

The court found for the appellee Jonathan Edwards, trustee, on the appellant's complaint and on the cross complaint. The appellant moved for a new trial, the only question presented by the motion being, whether the finding was sustained by sufficient legal evidence. The motion was overruled, and the court rendered judgment that the appellant take nothing by her complaint; that the appellant and the appellees Parker and Parker, and Totheroh and Totheroh, had no interest in the real estate mentioned in the cross complaint, describing it, being said one hundred and twenty-six acres, as against the mortgage executed by the Parkers to said trustee, subject to the right, if any, of the Parkers to redeem under the redemption laws of 1861 and 1879, and that said trustee recover of the appellant his costs, except those incidental to making the Parkers and the Totherohs parties to the cross complaint.

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The appellant's assignment of errors questions the correctness of the action of the court in overruling her demurrer to the cross complaint, in sustaining the demurrer to her answer to the cross complaint, and in overruling her motion for a new trial.

The cross complaint and the answer thereto are very long. The allegations of the cross complaint were sustained by the statement of facts submitted as evidence, and all the questions arising upon the pleadings are involved in the question of the sufficiency of the evidence. If the facts agreed to sustain the finding, there was no error in the rulings upon the demurrers. We will, therefore, not set out the cross complaint or the answer thereto, but will endeavor to abstract the substantial facts agreed upon, the statement in the record being long and complicated.

Said John J. French died intestate, in said county of Benton, in 1863, leaving surviving as his only heirs said Elizabeth Totheroh and Nancy I. Parker, his only children, and appellant, his widow; Elizabeth was then married, said Daniel Totheroh being her husband, and, in 1873, said Nancy was married to said William W. Parker. Said French at his death was seized in fee of fifty-three acres of land in Illinois, and two hundred and ninety acres in said Benton county, Indiana. Appellant was married to said David Bumgardner in 1872. In 1874, said William W. Parker sought to obtain from appellant and her husband a conveyance of the land in controversy, which was one of the tracts of which said French was seized at his death. Appellant at first objected, but on the 26th of February, 1875, she yielded to the solicitation of said Nancy, and appellant and her said husband then executed a quitclaim deed, which is set out in the evidence, for the tract of one hundred and twenty-six acres in controversy, to said Nancy I. Parker and her said husband.

On the 16th of August, 1875, said Elizabeth and Nancy, and their said husbands, executed to appellant their deed of quitclaim, which is set out, for all their right, title and interest

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in and to two other parcels of land in said county, together comprising ninety-seven acres, and being portions of the lands owned by said French as aforesaid.

On the 22d of March, 1878, appellant and her said husband, David Bumgardner, and said Nancy and her said husband, conveyed and warranted to said Elizabeth and her said husband, by a deed which is set out, twenty-eight acres, being a part of said tract of one hundred and twenty-six acres. This deed purported to be made to correct an error in the description of the land in a deed executed to the same grantees dated May 3d, 1875.

The consideration expressed in each of these three deeds was one dollar. In each the appellant was described as the widow of John J. French, and said Nancy and Elizabeth were described as his daughters.

It did not appear whether or not any deed of conveyance of the land in Illinois had been made. Elizabeth had occupied it since the death of her father.

The interrogatories filed with the cross complaint and appellant's sworn answers thereto were made parts of the agreed statement of facts. In one of her answers, in response to a question as to what agreement for partition of the lands was made, she said: "We never made any satisfactory agreement, but did make quitclaim deeds in 1875, and one warranty deed in 1878," being the deeds before mentioned. In answer to another question she said: "We never made any writings but the quitclaim deeds, and made no agreement whatever, except that by over-persuasion, I and my husband signed the deeds." She also said that she did not know of any other deeds than those mentioned.

Nancy and her said husband went into possession of said one hundred and twenty-six acres in 1874. Appellant said: "The reason why they went into possession was that they had no other place, and Wallace Parker" (said Nancy's husband) "insisted and requested me to let him take possession, and I consented."

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She said that Nancy and her husband had ever since been in exclusive possession of said 126 acres, except that portion so conveyed to said Totherohs, of which said Daniel Totheroh had been in possession for the last two years preceding the time of her answering the interrogatories, which was on the 28th of April, 1880.

Appellant and her husband had been in possession of said ninety-seven acres for five years preceding said last mentioned date. She said that she had not had possession during that period of the land in controversy, because she consented for her daughter Nancy and her husband to occupy it.

It was agreed that no effort was made, and no acts were performed, and no contracts were entered into, with reference to changing the title or possession of any real estate of said decedent, prior to February 26th, 1875, when the deed to the Parkers was executed without any consideration paid to appellant, but merely for friendship, and because the appellant supposed said Nancy would, at appellant's death, be entitled to that amount of land, as heir of said French and child of appellant; that said Totherohs, said Parkers and the appellant had, by mutual consent, remained in possession of the several tracts of land described in said deeds, since February 26th, 1875, without objection on the part of appellant; that the heirs made a friendly arrangement, after appellant's said second marriage, as to what portion of the decedent's real estate each should occupy, and the deeds indicated the lands each should occupy; that no proceedings in court were ever instituted to partition the real estate of the decedent, and there was no agreement to divide the same prior to the winter of 1874 and 1875, when it was agreed to sign and deliver the deeds, and they were afterward signed and delivered; that said French had no other lands than those mentioned; that when this suit was commenced said Elizabeth and her husband had no legal title to any part of the land described in the complaint, and said Nancy and her husband had no legal title to any other real estate owned by said French at the time of his

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death ; and that all said deeds were on record before November, 1876. It was further agreed that on November 1st, 1876, said William W. Parker borrowed of said Equitable Trust Company \$1,500, and he and his wife, said Nancy, made a mortgage to said Jonathan Edwards, as trustee, upon the land in controversy, to secure said loan, which mortgage was duly recorded in the records of said county, January 8th, 1877 ; that on the 5th of December, 1878, a suit in foreclosure was commenced in the United States Circuit Court, and a valid decree of foreclosure was entered in said court on the 6th of August, 1879, in favor of said mortgagee and against the defendants, said Parkers and others, but the appellant was not a party to that suit ; that a copy of said decree was lawfully issued, and, on the 27th of October, 1879, said real estate was duly and legally sold at a master's sale, and said Jonathan Edwards purchased the same, for the price of \$2,058.49, the amount of the decree and costs ; that said land had not been redeemed from said sale ; and that in this action the real party in interest as cross plaintiff was Jonathan Edwards, trustee for the Equitable Trust Company, and that if the petition of the plaintiff should not be granted by the court, and the cross petition should be granted, the decree of the court should be in favor of said Edwards as such trustee.

The appellant bases her claim upon section 18 of the statute of descents, as that section stood before its amendment in 1879. It provided : " If a widow shall marry a second or any subsequent time holding real estate in virtue of any previous marriage, such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be." 1 R. S. 1876, p. 411.

A married woman can not divest herself of legal title to real estate by estoppel *in pais*, or by any method except by deed in which her husband shall join. *Behler v. Weyburn*,

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59 Ind. 143. Much more, if possible, is it true that she can not divest herself by estoppel *in pais* where she can not divest herself by deed in which her husband joins. *Unfried v. Heberer*, 63 Ind. 67.

If the real estate mentioned in the complaint, or any portion thereof, could be said to be real estate held by her in virtue of her previous marriage, within the meaning of said statute, the deed of herself and her husband and her conduct would be wholly ineffectual to deprive her of title or right of possession, and her claim set up in the complaint would be well founded.

In *Moore v. Kerr*, 46 Ind. 468, this court, upon deliberation, expressly adopted the doctrine that a parol partition made by tenants in common, where possession is taken and held in pursuance of such partition, is valid; and it was said: "The distinction between the partition of lands among the owners thereof and a sale of lands is pretty clear. The statute of frauds relates to 'contracts for the sale of lands.' After partition of land has been made among tenants in common, each owns in severalty an interest equal to that which before he held in common. The partition does not transfer the title of the parties so much as it assigns or apportions to each his share in severalty in the land."

In 1 Washburn on Real Property, star p. 430, par. 13, it is said that although parol partition between tenants in common may not affect the legal title of the several owners, yet where it is followed by a possession in conformity with such partition, it will so far bind the possession as to give to each co-tenant the rights and incidents of an exclusive possession of his property.

In *Avery v. Akins*, 74 Ind. 283, the share of a married woman in real estate, held by her in virtue of a previous marriage, having been allotted to her in severalty by judgment of partition, it was held, that after the partition she held the portion set apart to her by the same title by which she held the undivided share before partition; that she held it by de-

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scent from her former husband, and not by purchase, and *Doe v. Dixon*, 5 A. & E. 834, was cited as authority. In *Doe v. Dixon*, one of two parceners had alienated in fee, whereby the alienee and the other parcener became tenants in common. The tenants in common made partition by deed, and it was held that by the deed of partition the parcener, as would have been the case if it had been between the parceners themselves, took nothing by purchase, but had the same estate in the land as before. See, also, *Utterback v. Terhune*, 75 Ind. 363; *Freeman Cotenancy & Partition*, section 396.

The question of title does not necessarily arise in an action for partition. *Harness v. Harness*, 49 Ind. 384; *McFerran v. McFerran*, 69 Ind. 29; *Earle v. Peterson*, 67 Ind. 503; R. S. 1881, section 1071.

Allnatt on Partition, 21 (5 Law Library), quoted in *Freeman on Cotenancy & Partition*, section 412, speaking of parol partition between parceners, says: "If parceners, seized in fee simple, marry, and they and their husbands make an equal and fair partition in value, it will be binding on the wives and their heirs; and the reason of this is, because the husbands and wives are compellable at common law to make partition; and that which they are compellable to do in this case by law, they may do by agreements without process of law."

In *Potter v. Wheeler*, 13 Mass. 504, the court said, that it is always in the power of one tenant in common to enforce partition, and that there seems to be no good reason why a voluntary performance of an act, to which the party is compellable by law, should not have the same effect as if produced by compulsion.

Lord Coke says (Co. Lit. 171 a): "As before, in the case of the fem covert, so it is in the case of the enfant; for if the partition be equall at the time of the allotment, it shall binde him forever, because he is compellable by law to make partition, and he shall not have his age in a *partitione facienda*; and though the partition be unequal, and the enfant hath the

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lesser part, yet is not the partition void but voidable by his entry; for if he take the whole profits of the unequall part, after his full age, the partition is made good forever."

In *Bavington v. Clarke*, 2 Penrose & W. 115, 124, it is said: "And so it is if partition is made without suit, provided it is fair. Where any person, even an infant, does that which by law he is compelled to do, that is, makes *equal partition*, he is bound."

In Freeman Cotenancy & Partition, section 415, the author says: "We have seen that voluntary partitions made by or on behalf of infants, and *femes covert*, will be treated as binding and valid where they were equal at the time they were made, and were, in their inception and consummation, free from all taint of fraud. The theory upon which such partitions are enforced is that the interests of the co-tenants are always best promoted by an occupation in severalty; and therefore that all honest and fair agreements, having a direct tendency to authorize such occupation, ought to be sustained. These parties, though under disabilities, may be compelled to make partition; and whatever the law will compel them to do, it ought to allow to be done without compulsion."

In *Newby v. Hinshaw*, 22 Ind. 334, a widow, holding land in virtue of her marriage, contracted for the sale thereof, and afterward she again married, and it was held that she might, during such subsequent marriage, be compelled to specifically perform the contract so made while she was sole, by conveying the legal title to the purchaser; and in *Deweese v. Reagan*, 40 Ind. 513, it was held, that what she could thus be compelled to do she might voluntarily do. The court said: "It is a general rule of the law, that parties may voluntarily do without suit that which a court would require them to do by a suit. * * The sale of the land is the substantial thing, and this can not be effected during such second or subsequent coverture."

A married woman holding real estate in virtue of a previous marriage, as did the appellant, might not, under said stat-

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ute voluntarily alienate such real estate, directly or indirectly, nor could she be compelled to alienate it. But she might be compelled, as a tenant in common, to make partition between herself and her co-tenants. *Finch v. Jackson*, 30 Ind. 387.

Partition between her and her co-tenants, whether made by judgment, by deed or by parol, not being a transfer of property by purchase, but being an allotment to each co-tenant of her share in severalty to be held by the same title as that by which before the partition she held her undivided share, and being something to make which such married woman, as well as her co-tenants, could be compelled, it can not, we think, be properly called an alienation within the meaning of the statute, whether accomplished by judgment, by deed or by parol.

We think it was not intended by the Legislature, that a woman, under such circumstances, should not be able to obtain the sole occupation and use of her share of land so held as tenant in common by any of the methods by which tenants in common generally may make severance of their shares. The purpose of the statute is not thereby thwarted.

If partition was agreed upon by appellant and her co-tenants, and what was done by them was done in performance of such agreement, the partition could not be vitiated by the fact that deeds of conveyance for the several shares were exchanged, or by the fact that each of the daughters, instead of taking the deed for her share to herself alone, took it to herself and her husband.

In *Sharpe v. Davis*, 76 Ind. 17, there was an instance of a partition of lands in which the share of one co-tenant was conveyed to his wife and daughter.

If the appellant has her full share of her first husband's lands, she is not legally concerned as to what her former co-tenants do with their several shares, whether they hold them in severalty or with their husbands as tenants by entireties, or sell them or give them away.

We can not say that the evidence was insufficient for the

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trial court to find that the co-tenants made partition, and that appellant's deed was executed to carry it out.

This was not a suit to obtain a new partition and a readjustment of the shares because of inequality in value of the shares given and taken under the partition made by the co-tenants, or for any other reason.

A judgment in partition can not be reversed in part. A reversal as to one party, it is said, would unsettle the whole partition, and require a new one. *Kyle v. Kyle*, 55 Ind. 387.

"It is not competent for a tenant in common to enforce partition as to a part of the common estate. He must go for a partition of the entire estate if he would divide any part."
1 Washb. Real Prop. 428.

If appellant has received in severalty her full one-third of the decedent's lands, she is not entitled to more. If she holds in severalty a portion of the lands, taken as her entire share, she should not come into court demanding more, without showing that she has not received her full share. If she can do so as to the portion conveyed to Nancy and her husband, why may she not also as to the portion conveyed to Elizabeth and her husband?

Retaining her own share, and claiming exclusive ownership of it in severalty, and making no offer to relinquish it or any portion of it, and not claiming that it was unequal in value to the other shares, the appellant sought partition of lands allotted by her in severalty to her late co-tenants, as if the lands of which she so sought partition were the only lands of the first husband.

It did not devolve upon the appellees to show that the share taken by her was unequal in value to the other shares. If such a reason for a new partition existed, it would be for her, in seeking a new partition, to show the inequality.

By asking partition, she claims a co-tenancy. If the deeds were exchanged for the purpose of making partition, she could not enforce partition of this portion of the lands owned by

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her first husband, while denying that the children of her first husband were her co-tenants of the lands which had been set off to her, and which she was occupying; and the appellee Edwards, trustee, claiming under appellant's co-tenants, could not be affected by their indifference in this action as to whether the appellant, retaining her own share, should recover a portion of their shares from said trustee.

The land which she is unable to alienate during her subsequent marriage is that which she holds in severalty as her share of all her former husband's lands, and her deed made in effecting the partition could not be regarded as an attempted alienation forbidden by the statute.

We think the judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at appellant's costs.

No. 9236.

WRIGHT ET AL. v. GELVIN, TRUSTEE.

JUDICIAL SALE.—*Husband and Wife.*—*Assignment for Benefit of Creditors.*—

Wife's Inchoate Interest.—If a husband owning realty makes an assignment, under the statute, for the benefit of creditors, the assignee can sell only the undivided two-thirds of the land; such sale being a judicial sale whereby, under the law of 1875, the wife's inchoate right becomes absolute.

From the Ripley Circuit Court.

J. W. Gordon, R. N. Lamb and S. M. Shepard, for appellants.

W. D. Willson and C. H. Willson, for appellee.

WOODS, C. J.—The appellants, Mary and James M. Wright, are husband and wife. The said James made a voluntary assignment of all his property, including certain real estate, to the appellee, as trustee, for the benefit of his creditors. After

85	128
140	330

85	128
158	379

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the execution of that assignment, the appellee filed his complaint against the appellants, alleging that the said Mary was asserting a present right to one-third of the real estate, and asking to have his title under the assignment quieted against her claim. The court having overruled their demurrer to the complaint, the defendants answered that they were husband and wife at the time the assignment under which the appellee claims was executed, and that the said Mary had not joined in the assignment, nor otherwise parted with her rights.

The court sustained a demurrer for want of facts to this answer, and, the defendants declining to plead further, gave judgment "That the plaintiff is the owner in fee simple of the real estate (described) subject to the right of said Mary to one-third of the same at the death of her husband, James M. Wright, in case she survives him."

This is not in accord with the doctrine declared in *Lawson v. DeBolt*, 78 Ind. 563, wherein it was held that the sale of a debtor's real estate by the assignee, under the act of March 5th, 1859, providing for voluntary assignments, is a judicial sale within the meaning of the act of March 11th, 1875. It is true that the assignee in this case had not made a sale of the realty in question, and, consequently the inchoate right of the appellant Mary had not yet vested, but, except for the purpose of enabling him to sell the property, the assignee could have no right to maintain an action to quiet the title, and it necessarily follows that, though the alleged assertion of title by the said Mary was beyond and greater than her present right, it afforded the appellee no cause of action, because the moment he should make a sale of the property her right would thereby be made as large as her claim.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

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No. 9874.

FAULKNER v. THE CITY OF AURORA.

CITY.—*Coasting on Streets.—Personal Injury to Traveller.—Liability.*—A city, after having adopted an ordinance prohibiting, upon its streets, sports tending to produce bodily injury, is not liable for a collision occurring upon a street, whereby a traveller was injured, as the result of coasting for sport, though the sport was carried on by crowds, publicly, in the presence of its officers and police, to the obvious danger of persons using the street.

From the Dearborn Circuit Court.

O. F. Roberts, for appellant.

C. S. Jelley, for appellee.

MORRIS, C.—The appellant sued the appellee for an injury sustained by his son, on Main street in the city of Aurora, on the 30th day of November, 1880.

It is alleged in the complaint, that from the 1st day of November, 1880, until the 15th day of February, 1881, said Main street, extending from Fifth street to First street in said city, and crossed by Fourth, Third and Second streets in said city, was, during said time, between Fifth and Third streets, covered with frozen snow and ice to the depth of five inches, rendering its surface smooth, even and sleek; that during said period large crowds, numbering one hundred persons, daily and nightly assembled on said Main street, between Fifth and Third streets in said city, with the knowledge of the appellee, and in the presence of its mayor, marshal and police officers, and engaged in the sport of sliding and coasting down Main street, over Fourth street, where the descent of Main street was very great, at the rate of forty miles per hour, thereby rendering said Main street and Fourth street, where it crossed the same, dangerous and unsafe for travel; that the plaintiff's son, Benjamin Faulkner, a lad about seven years of age, was accustomed to pass along said Fourth street, over Main street, to and from the public school in said city, that being the most direct and convenient way to and from

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said school; that on the 30th day of November, 1880, the appellant's said son was passing over said Main street on Fourth street, when he was struck, without fault on his part, by a sled propelled by the weight of two persons, so unlawfully engaged in the sport of sliding and coasting on said street, whereby his leg was broken, and he was otherwise greatly bruised and injured. It is averred that the appellant's son was confined to his bed for a long time, and that the appellant was put to great trouble and expense in nursing and caring for his said son. It is also averred that the following provisions of the ordinances of the appellee were in force at the time:

"Article 4, section 2. Each officer of the city of Aurora shall faithfully do and perform the duties required of him in his office by the act of incorporation and by the ordinances, and by-laws of the city and resolutions of the city council.

"Article 11, sec. 32. It shall be unlawful for any minor or other person or persons to throw stones, play ball, pitch quoits, or engage in any sport or do anything on any street or alley, within the city limits, tending to produce a bodily injury, or endanger the life or property of any person.

"Article 11, sec. —. Any person violating any provision of this article shall, upon conviction before the mayor or other competent jurisdiction, forfeit and pay to said city such penalty as may be assessed, not less than one nor more than one hundred dollars, with costs."

The appellee demurred to the complaint, on the ground that it did not contain facts sufficient to constitute a cause of action. The demurrer was sustained. The appellant excepted, and, electing to stand by his complaint, final judgment was rendered against him and in favor of the appellee, for costs.

The rendering of judgment against the appellant, and the sustaining of the demurrer to his complaint, are assigned as errors.

It is alleged in the complaint that the appellee had notice

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of the occupation of its street by said coasters, and that the sport of coasting was carried on in the presence of its officers. It is also alleged that the appellee had, by ordinance, prohibited, under suitable penalties, all persons from engaging in any sport on its streets that might be dangerous to life or property; that said coasting was dangerous to life, and that no efforts were made by the appellee or its officers to suppress or prevent this dangerous sport.

That the occupation of one of the travelled streets of the appellee by coasters, in the manner stated in the complaint, would seriously interfere with the legitimate public use of the same, and endanger the safety of those rightfully traveling along and across it, hardly admits of a doubt. Such a use of the streets of a city is not only unauthorized and wrong, but altogether inconsistent with the rights of the public.

“Highways,” says a recent writer of approved authority, “are intended for, and devoted to, the purposes of public travel, and every person may exercise this right reasonably. But every unreasonable use of the same, whereby others are hindered, delayed or annoyed in a like reasonable use of the same, or in the rights incident thereto, is a nuisance. But whether a particular use, that is not a nuisance *per se*, is an unreasonable use and nuisance, is a question of fact, to be judged of from the circumstances of each case.” Wood Law of Nuisances, section 251.

Though the coasting on Main street, within the corporate limits of the appellee, as described in the complaint, constituted a nuisance, yet it could hardly be said that if one person should descend said street on a sled at a proper time and at a moderate rate of speed, though in sport and for pleasure merely, such use of the street would necessarily constitute a nuisance. Such a use of the street might not be inconsistent with its use by the public nor render it dangerous or unsafe for travel. A person may drive his horse along the street at a reasonable rate of speed, even for pleasure, consistently with the use of the same by the public; but if he should drive his

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horse at a rapid and unreasonable rate of speed, it would endanger the safety of travel, and become a nuisance. Whether the coasting or the driving of the horse upon the street for pleasure would be a nuisance would depend upon the circumstances of each case. A police officer who would attempt to stop the one or the other would act at his peril; he would have to determine the fact, and if he misjudged he would be responsible.

It would be difficult, if not impossible, to suggest any ground upon which, consistently with the adjudged cases and the principles of law, the liability of the appellee for the injury complained of can rest. Those who injured the appellant were in no way connected with the appellee; they acted upon their own volition, and carried on their sport for their own pleasure, not for the benefit of the appellee, nor at its instance. The wrong was theirs, not the appellee's. The sport in which they were engaged was not necessarily a nuisance; it might have been carried on innocently. *Hutchinson v. Concord*, 41 Vt. 271. Was it the duty of the appellee to watch the sport and determine, judicially and at its peril, when it ceased to be innocent and lawful and became dangerous and unlawful? And if it failed to discover the line separating between innocence and wrong, is it to be held liable for such error of judgment? The determination of such a question is not only judicial in its character, but it must necessarily depend upon the actual facts in the particular case. *Wood Law of Nuisances, supra*. To hold the appellee liable for errors of judgment upon such a question would be opposed to the decided weight of authority. *Dillon Mun. Corp.*, section 32; *Gale v. Kalamazoo*, 23 Mich. 344 (9 Am. R. 80); *Brimmer v. Boston*, 102 Mass. 19.

In the case of *Wilson v. Mayor, etc.*, 1 Denio, 595, it is held that where a duty, judicial in its nature, is imposed upon a corporation, it is not liable even for misconduct in its exercise.

In this case the appellee had, by ordinance, prohibited all persons from engaging in dangerous sports upon its streets.

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It is alleged in the complaint, at least inferentially, that the coasting complained of was carried on in violation of this ordinance. But it is also averred, that neither the appellee nor its officers attempted in any way to suppress or prevent the unlawful occupation of its streets by the coasters.

The appellee, having, by the express terms of the statute, exclusive power over its streets, had authority, doubtless, by ordinance, to empower its officers to stop and suppress coasting upon its streets at once. But was it bound to do so? If it deemed the ordinance referred to in the complaint sufficient to prevent coasting and other dangerous sports upon its streets, is it to be adjudged liable because it did not provide a more stringent, and, perhaps, a better and more efficient, remedy? The law has confided to the legislative judgment and discretion of the common council of the appellee the power to enact ordinances. If, in the honest exercise of this power, the common council fails, through want of experience or defect of judgment, to establish such laws as are most completely and effectively adapted to the accomplishment of the end in view, the city is not liable. *Dillon Mun. Corp.*, section 753, and cases there cited; *Brinkmeyer v. City of Evansville*, 29 Ind. 187. It could only prevent or suppress such sports through its officers, and for their neglect, as we shall hereafter see, it is not liable.

We are aware that the case of *Marriott v. Mayor, etc.*, 9 Md. 160, is opposed to this conclusion, but we regard the case as exceptional and without support. Besides, by the express provisions of the charter of Baltimore, the city council had, at the time referred to in the opinion, power to declare what should constitute a nuisance, and to abate the same. The court held that it was the duty of the city council to declare by ordinance coasting on its streets to be a nuisance, and to prevent it; and that, for its failure to do so, it might at common law be liable to a party injured, without his fault, by coasters.

Without seriously complaining of the appellee for having

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failed to pass a proper ordinance for the prevention of coasting, the appellant seems to rest his right to recover upon its failure to execute the ordinance which it had adopted. Was the appellee liable for such failure? Any one of the appellee's citizens might, under the ordinance, have instituted proceedings against persons coasting on the streets in violation of its provisions. Grant, however, that it was peculiarly the duty of the officers of the appellee to enforce the ordinance and prosecute all persons violating the same, the appellee would not be liable for their failure to discharge this duty. Dillon says, sec. 754:

“ Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation is not bound to provide for and secure a perfect execution of its by-laws, and it is not responsible in a civil action for the neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened.” A city is not liable for the neglect of its marshal, its police officers or firemen appointed by it. *Buttrick v. City of Lowell*, 1 Allen, 172; *Ready v. Mayor, etc.*, 6 Ala. 327; *Schultz v. City of Milwaukee*, 49 Wis. 254 (35 Am. R. 779); *Levy v. Mayor, etc.*, 1 Sandf. 465, approved in *Lorillard v. Town of Monroe*, 11 N. Y. 392; *Griffin v. Mayor, etc.*, 9 N. Y. 456. But, aside from this view of the case, we think the appellee was not legally bound to prevent or abate the nuisance complained of by the appellant. In the case of *Schultz v. City of Milwaukee*, *supra*, which is precisely the case before us, the court says:

“ The coasting or sliding down Poplar street in the manner and to the extent charged in the complaint was, while being indulged in, a grievous public nuisance, which the city authorities ought to have prevented or suppressed. But this duty is a public or police, rather than a corporate, duty, in the performance of which the corporation, as such, ‘has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see

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performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community.'” And the court explains its former decision in the case of *Little v. City of Madison*, 42 Wis. 643 (24 Am. R. 435), relied upon by the appellant, as follows: “ Yet the precise ground of the judgment in that case is, that if a municipal corporation, in the attempted exercise of any power conferred upon it by law, as to license shows, amusements and the like, exceeds its authority, and licenses the placing of a public nuisance in a street, or the unlawful and dangerous use of a street for any purpose, and an injury results therefrom, without negligence on the part of the person injured, the municipality is liable to respond in damages for such injury. The case goes no further, and could not without violating well settled principles of law.”

Public streets are for the public use, and the use is none the less for the public at large because they are situated within a municipality and subject to its supervision, and, for this reason, placing obstructions thereon is an indictable offence and may be restrained in equity. *Dillon*, secs. 519 and 520; *Smith v. State*, 3 Zab. 712; *State, ex rel., v. Cincinnati, etc., Co.*, 18 Ohio St. 262.

In the case of *Borough of Norristown v. Fitzpatrick*, 94 Pa. St. 121 (39 Am. R. 771), it was held that a person injured by the discharge of a cannon by a crowd collected together on one of the streets of the borough, which had been engaged in firing the cannon for amusement for some hours, was not entitled to recover from the village damages for such injury. GORDON, J., says:

“Admitting that a mob is a nuisance, and that of the worst kind, nevertheless, it is one that a municipal corporation could not abate by the use of ordinary appliances such as suffice for the removal of natural or material obstructions in or near a highway; resort must, therefore, be had to the police force, but, as we have already seen, for the doings or misdoings of those who compose this force the municipality is not liable.”

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If, as held in this case, a municipal corporation is not liable to a person injured by the discharge of a cannon by men collected in its streets for the purpose of firing the cannon for their amusement, it could hardly be held liable for an injury occasioned by the less dangerous amusement of persons coasting upon its streets. In the case cited, it was justly held that the persons engaged in the firing of the cannon were liable to the party injured, and so doubtless would the parties in this case, who were engaged in the unlawful sport which resulted in injury to the appellant, be liable to him in damages.

In the case of *Ray v. Manchester*, 46 N. H. 59, and in the case of *Hutchinson v. Concord*, 41 Vt. 271, it was held that coasting on a highway is not a defect in a highway for which a city or town is liable. The same has been held in Massachusetts. *Cole v. Newburyport*, 129 Mass. 594 (37 Am. R. 394); *Shepherd v. Inhabitants of Chelsea*, 4 Allen, 113.

In the case of *Hutchinson v. Concord*, *supra*, the court says:

"It is true that towns may be liable for damages by obstructions placed in the highway by others without any agency of the town or its officers, such as a log, wood, timber, or stone, if the town negligently suffers such obstructions to remain, exposing the traveller to danger. But in such case the road, with such objects resting upon it, is thereby rendered insufficient or out of repair; and the town has the power to restore it to its proper condition. * * * But as to the boys with their sleds upon the road, it is quite different. It is not made unlawful by the statute, to travel upon the highway with such sleds, nor are the selectmen empowered to prohibit it. The selectmen are only empowered to prohibit one mode of use of such sleds, or like vehicles, upon the highway; that is, coasting; and then only when and where, in their opinion, the travelling public is, or is likely to be, endangered by it."

It is insisted by the appellant, that the rule in Massachusetts and other New England States upon this subject is more limited than it is elsewhere. The statutes of Massachusetts and the other New England States provide that highways

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shall be kept in repair at the expense of the town or city in which they are situated, so as to be safe and convenient for travellers; and that any person who receives or suffers bodily injury through a defect or want of repair in the highway may recover the amount of damages thereby sustained, in an action against the city or town obliged to repair the same.

It is held under this statute that anything in the condition of a highway, which renders it unsafe or inconvenient for travel, is a defect or want of repair. It may be a hole in the highway, or it may consist of a stone or log or other obstacle left on its surface, or a post standing within its limits, or a barrier stretched across it, though not touching it; or it may be trees or walls standing by or upon it, and liable to fall and injure travellers; or it may be an awning projecting over it. For a failure to remove any obstruction from the highway, or to repair it and to keep it in a condition to be reasonably safe for travel, the statute expressly makes the city or town in which the highway is located, liable for injuries resulting from obstructions or want of repair of such highway.

The law of Indiana and many other States gives to incorporated cities jurisdiction over the streets located within their limits, and the means necessary to keep them in repair and reasonably safe for travel. Hence, the duty to keep the streets reasonably fit and safe for public use is implied, and also the liability for a failure to discharge this duty. It would seem, therefore, that the law of Indiana upon the subject is the same as that of Massachusetts. If, in this State, a city keeps the streets within its limits in a reasonably safe and convenient condition for public use, it has discharged its whole duty upon the subject; if a city in Massachusetts does less than this, it fails to discharge the duty imposed upon it by the statute of the State. If coasting upon a public street in a city in Indiana is to be regarded as an obstruction which the city is bound to prevent or suppress, it should be so regarded in Massachusetts.

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In speaking upon the general implied liability of cities, Judge Dillon says, sec. 789 :

“A municipal corporation is not an insurer against accidents upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day.” This is the liability which, under its statutes, is held to exist in Massachusetts.

In the case of *Barber v. City of Roxbury*, 11 Allen, 318, the court says :

“But we are not aware of any precedent for holding an illegal use of the highway by men, animals, vehicles, engines or any other object, while movable and actually being moved by human will and direction, and neither fixed to, nor resting on, nor remaining in one position within the travelled part of the highway, to be a defect or want of repair for which the city or town is liable.”

It is obvious that in the case before us the injury did not result from any defect in the highway. It was produced by the act of those improperly and unlawfully using the highway, which was at the time, and but for the unlawful acts of those improperly using the street, in a reasonably safe and convenient condition for public travel. The complaint is not that the appellant's son was injured because of defects in the street rendering it unsafe and unfit for public use, but because persons, while engaged in improperly using the street, ran their coasting sled against his son, thereby injuring him. If the appellee is liable for the injury thus produced, it would follow, logically, that it would be liable for an injury caused by loafers lounging upon its streets, occurring in the presence of its officers, if it were known that such persons were accustomed to lounge and loaf upon its streets. To hold incorporated cities liable for such injuries would be unjust and, we think, without the sanction of law.

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As was held in the case of *Borough of Norristown v. Fitzpatrick, supra*, the appellee could only arrest and stop the sport of coasting upon its streets through its officers and police force, but, as held in the same case, the appellee would not be responsible for the neglect or failure of its officers to stop those engaged in thus using its streets.

In the case of *Norristown v. Moyer*, 67 Pa. St. 355, relied upon by the appellant, it was incidentally and by way of illustration stated by the judge who tried the case, that persons lounging and loafing upon the street corners constituted a nuisance, but it was not held nor was it intimated that the city would be liable for the misdeeds of such loafers.

In the case of *Parker v. Mayor, etc.*, 39 Ga. 725, and the cases in this State referred to by the appellant, the objects rendering the use of the highway unsafe and dangerous were of a material nature, fixed, and not at the time being moved and controlled by human will and direction. They were such objects as would constitute a nuisance in Pennsylvania, Wisconsin and Massachusetts, as well as in Georgia or Indiana.

We think there was no error in sustaining the demurrer to the complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

COOMBS, J., dissents; NIBLACK, J., doubts.

85	140
124	371
126	563

No. 9353.

O'HARROW ET AL. v. WHITNEY ET AL.

WILL.—*Devise During Widowhood.*—*Election.*—*Descent.*—Where a husband dies, leaving a wife and two children surviving him, having devised his land to his wife during widowhood, and she elects to accept the provision made for her by will, her estate is limited in duration to the period of her widowhood; and a purchaser, through a mortgage executed by

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her after a second marriage, acquires no title to any part of the land. And the fact that no disposition of the land was made after the wife ceased to be a widow, did not entitle her to any portion of it under the law, as her election to take under the will precluded any such claim.

From the Greene Circuit Court.

J. D. Alexander and *H. W. Letsinger*, for appellants.

R. N. Taylor, for appellees.

BEST, C.—The appellees brought this action against the appellants for the partition of certain real estate in Greene county, in this State, alleging in their complaint that they were the owners of the undivided one-third, and the appellants the owners of the residue of said land, which was held by them as tenants in common.

The appellants, who were minors, appeared by guardian *ad litem* and filed an answer of two paragraphs. The first was a general denial, and the second was special. They also filed a counter-claim, styled a cross complaint, in which it was in substance averred that John O'Harrow, on the 23d day of April, 1874, died testate, seized in fee simple of the land in the complaint described, leaving surviving him Margaret O'Harrow, his widow, and the appellants, his only children and heirs at law; that before his death he duly executed his will, which was thereafter duly probated in said county, a copy of which was filed, by which he devised the lands in the complaint mentioned to said Margaret O'Harrow during her widowhood; that thereafter said Margaret accepted the provision so made for her by said will, took possession of all the property belonging to said estate, and retained the same until she was thereafter married to John J. Fairchild; that, before her marriage with said Fairchild, said Margaret executed a mortgage upon the one-third of the land mentioned in the complaint to one Jaola M. Currier, who, after the marriage of said Margaret as aforesaid, obtained a judgment of foreclosure, by default, against said Margaret and her husband, caused the land to be sold upon said decree, and at such sale the ap-

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pellees purchased said land, have received a sheriff's deed therefor, and by virtue thereof now claim the undivided one-third of said land; that appellants are the owners of said land, and that the claim of appellees is adverse to them, etc. Wherefore they pray that their title may be quieted.

The second paragraph of the answer alleged substantially the same facts in defence of the action.

The will is as follows:

"First. It is my will that my just debts and all charges be paid out of my estate.

"Item 2d. I give and devise all the residue of my estate to Margaret, my wife, so long as she remains my widow, and I appoint Margaret, my wife, executrix of this, my last will and testament."

A demurrer, for the want of facts, was sustained to the counter-claim, and a demurrer was also sustained to the second paragraph of the answer, to which exceptions were taken, after which partition was ordered and made in accordance with the prayer of the complaint.

On this appeal the rulings upon the demurrers present the only questions in the record.

The statute provides that, "If lands be devised to a woman, or a pecuniary or other provision be made for her by the will of her late husband, * she shall make her election whether she will take the lands so devised, or the provision so made, or whether she will retain the right to one-third of the land of her late husband; but she shall not be entitled to both, unless it plainly appears by the will to have been the intention of the testator that she should have such lands, or pecuniary or other provision thus devised or bequeathed, in addition to her rights in the lands of her husband." 1 R. S. 1876, p. 415, section 41.

The will in this case makes a substantial provision for the widow, and as it does not plainly appear therefrom that it was the intention of the testator that she should have such provision, in addition to her right in the lands of her late husband, she was required to elect between the provision thus

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made for her and her right to the one-third of the land of her husband. *Young v. Pickens*, 49 Ind. 23; *Ragsdale v. Parrish*, 74 Ind. 191.

The widow having elected to accept the provision made for her by the will of her husband, her estate in such lands in point of duration was limited to the period of her widowhood by the express terms of the will. *Harmon v. Brown*, 58 Ind. 207; *Stilwell v. Knapper*, 69 Ind. 558 (35 Am. R. 240); *Tate v. McLain*, 74 Ind. 493.

These propositions, as we are informed, were not seriously controverted by the appellees in the trial court, but they claimed that, as no disposition was made of the estate after the expiration of said Margaret's widowhood, the testator would be regarded as having died intestate as to his estate thereafter, and, as said Margaret was entitled by descent to one-third of said land, she would take such portion by descent, notwithstanding the fact that she had accepted the provision made for her by the will of her late husband.

This proposition is clearly untenable. The fact, that she was required to and did make an election between the provision made for her by will and her right to one-third of the land, precludes her from making any such claim. An election presupposes a choice between inconsistent rights, and the selection of one is necessarily a relinquishment of any claim to the other. If it were not it would follow that there had been no election at all; but where an election between inconsistent rights has been made, as averred, the acceptance of one forever precludes the party from claiming the other. If the law had cast the entire estate upon the widow, the acceptance of a portion of it under a will would not preclude her from claiming the residue under the law, for the obvious reason that she has made no election between inconsistent rights. The acceptance, under a will, of that which belongs to a widow by the law, is no election at all; such acceptance is an idle ceremony that in no manner precludes her from claiming her rights under the law. *Waugh v. Riley*, 68 Ind. 482.

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In this case, however, the law did not cast the entire estate upon the widow, but at most one-third, and her election to take all during widowhood, instead of one-third in fee, was an election between inconsistent rights, and necessarily amounted to a relinquishment of all claims to any portion of it under the law. This precise question was decided adversely to the appellees in *Ragsdale v. Parrish*, 74 Ind. 191, and that decision is conclusive upon this question.

As the widow's right to any portion of these lands, according to the averments of these pleadings, ceased at her marriage with Fairchild, and, as the appellees claim through her, it follows that they have no title to them. For these reasons we are of opinion that the demurrer to the second paragraph of the answer, and the demurrer to the counter-claim, were improperly overruled, and that for these errors the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellees' costs, with instructions to overrule the demurrer to the second paragraph of the answer, and the demurrer to the counter-claim, and for further proceedings, etc.

85	144
128	151
85	144
133	582

 No. 9393.

POND, ADMINISTRATOR, ET AL. v. SWEETSER ET AL.

DECEDENTS' ESTATES.—*Right of Action.*—*Representative and Heir.*—The right to sue for money or other personalty of a decedent belongs to the personal representative, not to the heir or widow.

PLEADING.—*Intendments.*—If the allegations of a pleading be ambiguous, uncertain or defective, they must be construed more strongly against the pleader.

HUSBAND AND WIFE.—*Disposition of Personalty.*—The law of this State places no restriction, in the interest of the wife, upon the power of a husband to dispose of his personal estate.

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SAME.—Conflict of Laws.—Foreign Statutes in Derogation of Common Right.—Construction.—Statutes in derogation of common right, as for instance, if in restraint of the owner's power to dispose of his personal estate, and especially a foreign statute, when invoked, if it may be at all, to affect transactions in this State, will be strictly construed.

SAME.—Trust and Trustee.—Personal Property.—A foreign statute, which forbids the creation of a trust in personalty for the sole use of the person declaring the trust, will not be deemed to affect a transfer or assignment made in this State of property situated here, by a resident of the foreign State, in trust partly for himself and partly for others.

From the Grant Circuit Court.

E. S. Williams, I. VanDevanter and J. W. Lacey, for appellants.

A. Steele and R. T. St. John, for appellees.

WOODS, C. J.—The circuit court sustained demurrers respectively to the complaint of the appellant Pond, as administrator of the estate of Bartholomew Anderson, and to the cross complaint of the appellant Amanda Anderson; and error is assigned upon these rulings. The averments in each of these complaints and the exhibits filed therewith are substantially identical. That of the administrator is to the effect, and mainly of the tenor, following:

Isaac P. Pond, administrator, etc., complains of David B. Sweetser (and others named) and says that said Bartholomew Anderson died intestate on the 27th day of August, 1878, being the owner of notes, credits, choses in action, money and other personal property of the value of \$5,500, and that the plaintiff is the duly appointed, qualified and acting administrator of his estate; that said Sweetser claims to hold all of said property and the proceeds thereof as successor to one James Sweetser as trustee of a pretended trust deed, a copy of which is filed herewith, made by the decedent on the 7th day of July, 1877; that said deed did not and does not convey to the defendants or any of them any title to said property or any part of it, but was and is fraudulent and void for the reasons following, to wit: Said decedent, more than

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four years before his death, to wit, in 1870, was married to the defendant Amanda Anderson (then Johnson) and lived with her as his wife until his death in the town of Addison, Champaign county, Ohio; that, under the laws of descent and distribution of Ohio, said Amanda became entitled, at the death of her husband, to one-half of the first four hundred dollars and one-third of the remainder of the personal property, money and credits of the decedent, in addition to her maintenance for one year, and was and is a *quasi* creditor of the estate of said decedent for said share of the property; that said deed of trust was made without the knowledge or consent of said Amanda, and the decedent did not, by will, deed of settlement or otherwise, make any provision for her support or maintenance in lieu of her legal claims upon his estate as widow or for any other purpose whatever; that the deed was a pretended conveyance of his estate, consisting of goods and chattels, for his own use and for the benefit of his grandchildren and great-grandchildren, with the intent to deprive the said Amanda of her portion thereof after his decease, made with the fraudulent intent to dispose of said property after the death of the deceased, for the purpose of depriving his wife, the said Amanda, of her legal right to a share of the property and maintenance out of the same; that the decedent did not, by said deed or in any other manner, part with the possession or control of said property, or of any part of it, but reserved to himself the full possession and control of the property and of its proceeds, and was so in control and was in full and actual possession of the property at the time of his death; that the decedent attempted by said deed to convey and dispose of all his property, and did not at the time, nor at any time afterwards, nor at his death, have any property save that described in said deed; that besides the defendants, the beneficiaries named in said deed, the decedent left other heirs at law who are still living; that under the laws of Ohio, which are made a part of the complaint, said deed is void; that the defendants, except Sweetser and Amanda

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Anderson, are claiming the whole of said property under said deed, and the said Amanda is claiming a share thereof as widow of the intestate; that on the 16th day of October, 1879, before the commencement of this action, the plaintiff demanded an accounting with the defendant Sweetser and a surrender by him to the plaintiff as administrator as aforesaid of all said property so as aforesaid in his hands, all of which he refused and at all times has refused.

Wherefore the plaintiff prays that said deed be declared null and void, and that said Sweetser be required to account for and to surrender to the plaintiff all of said property.

COPY OF OHIO LAW.

“The widow shall be entitled, upon distribution, to one-half of any sum not exceeding \$400, and to one-third of the residue of the personal estate subject to distribution.

“All deeds of gift or conveyance of goods and chattels, made in trust to the use of the person or persons making the same, shall be and hereby are declared to be void and of no effect.

“The appraisers shall also set off and allow to the widow and children under the age of fifteen years, if any there be, * * sufficient provisions or other property to support them for twelve months from the death of the decedent.”

The deed referred to, after reciting the names and residences of the parties, respectively, in Ohio and Indiana, the desire of the grantor to make provision for the *cestuis que trust*, named and described as his grandchildren and great-grandchildren, and his desire to retain for his own use and support during life the rents, issues and profits of the property, proceeds in the tenor following:

“Now, therefore, this indenture witnesseth, that the said Bartholomew Anderson, in consideration of the premises and of one dollar to him paid by said James Sweetser, doth bargain, sell, release, convey and confirm to the said James Sweetser, in trust for the above named,” etc., “the following real estate in Champaign county, Ohio:” (description). “Also the fol-

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lowing personal property, to wit :” (a list of promissory notes). “Also, the sum of \$3,170.71 in cash on deposit in the bank of Sweetser’s, in Marion, Indiana, to have and to hold,” etc., “to the said James Sweetser, as such trustee, and to his successors in trust, and upon the use and trusts and for the purposes hereinafter named, viz. :

“To hold the said personal estate and moneys, to loan, control and manage the same and receive the interest and profits arising therefrom, and to pay such interest and profits to the said Bartholomew Anderson as the same may be selected or required by said Anderson during the term of his natural life for his support, and, if it shall become necessary, to appropriate in addition thereto an amount of the principal sufficient to maintain and keep him, said Bartholomew Anderson, during his natural life ; and, at the death of said Anderson, the said trustee, of whatever sum may remain in his hands, shall pay” to the beneficiaries named specified shares.

“The said trustee shall hold the above described lands, as provided herein ; the said Bartholomew Anderson reserving to himself the possession, rents, issues and profits of the same for the term of his natural life for his support, and at his death the trustee shall sell the same and divide the proceeds between the beneficiaries above named in the proportions aforesaid, that is to say,” etc. ; “the said trustee retaining from such funds so received a reasonable compensation for his services in the discharge of the trust herein ; and the said James Sweetser doth hereby signify his acceptance of this trust, and doth agree to faithfully execute the same according to the meaning of these presents. In testimony whereof the parties have hereunto set their hands and seals this July 7th, A. D. 1877.

“[Signed] BARTHOLOMEW ANDERSON. [L. S.]

 “JAMES SWEETSER. [L. S.]”

Appended is an acknowledgment in due form before Edgar S. Goldthwait, a notary public of Grant county.

There can be no doubt of the correctness of the ruling upon the demurrer to the cross complaint. Whether determined by the

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law of this State or that of Ohio, and upon any interpretation of the law contended for by counsel, her right in the property can be no more than a distributive share, to be received at the hands of the administrator; and if there be a cause of action against the appellees upon the facts stated, it must be in favor of the administrator.

The complaint is one which it is not easy either to characterize or clearly to understand. While the trust deed is made an exhibit, it is not the basis of the action—the instrument sued on—and, perhaps, under numerous decisions, not to be considered as a part of the pleading. The deed left out, the complaint contains no such description of property as is necessary to a complaint in replevin, nor, perhaps, any such allegation and description of moneys, notes or property in the hands of the defendants, or of any of them, as to make it a good complaint for an accounting. No excuse is alleged for not stating and describing definitely what was claimed to be in the possession of the defendant Sweetser; and even if the deed were regarded as a part of the complaint, it could hardly be deemed to help out the pleading in this respect.

Indeed, there is no averment in the complaint that any of the property in question was in the possession of Sweetser. The nearest approach to such an averment is the allegation that Sweetser “*claims to hold*” the property and proceeds as the successor to the trustee named in the deed, and the allegation that the plaintiff demanded of said Sweetser an accounting for and surrender of the property. On the other hand, it is not averred that James Sweetser, the trustee named, ever had possession, but rather the contrary, in that it is alleged that the decedent did not, by the deed or otherwise, part with possession and control of all or any of the property, but reserved and was in full and actual possession at the time of his death.

The fair, if indeed not the strict and necessary, construction of the complaint would seem to be that the trust deed was executed, but possession never delivered and taken, and the

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trust in no manner executed by the parties, the grantor having retained actual possession until his death; and that now the defendant claims to hold as successor to the trustee named. That he was ever named or appointed such successor, or obtained actual control of any of the property, is not alleged, and, by the familiar rule of construing a pleading most strongly against the pleader, an inference of such possession would seem to be inadmissible.

The only construction which will admit of such an inference must be in holding that the allegations concerning the possession reserved and held by the decedent, after the making of the deed, are not to be treated as averments of fact independent of the deed, but as declaring the pleader's interpretation of that instrument, namely, that, notwithstanding the possession of the property by the trustee under the deed, yet the actual control and possession, by reason of the reservation, was in the grantor. Adopting this view, for the sake of the argument, and treating the deed as a part of the pleading, we are of opinion that the demurrer was properly sustained.

Upon this view it stands admitted that the personal property, which alone is in controversy, was in this State, and was delivered to the trustee resident in the State under the trust deed, which was made in this State. It is not claimed that there are any creditors of the intestate who can be injured if the deed is upheld; and there is nothing in the law of this State which gives the wife an interest in the personal estate of the husband which in any manner restricts his power of disposition during life. In what he dies possessed of she has an interest, but during life he may dispose of it by gift or otherwise, to the exclusion of any claim on her behalf.

Whether the law of Ohio, if found to be in conflict with our own, would be permitted to govern the case, we do not find it necessary to decide. See *Ames Iron Works v. Warren*, 76 Ind. 512 (40 Am. R. 258); *Hibernia National Bank v. Lacombe*, 84 N. Y. 367 (38 Am. R. 518).

We find nothing in the alleged laws of Ohio which, if appli-

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cable, can be deemed to invalidate the deed in question, or the trust therein declared. When strictly construed, as statutes in derogation of the common right to hold and dispose of property ought to be construed, the statute applies only to declarations of trust solely in favor of the person or persons making the same; and there are manifest considerations of policy and reason in support of such a law, as there are for the provision that a conveyance or devise of land to a nominal trustee, who has no power of disposition or management, shall be void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary. R. S. 1881, sec. 2981. On the other hand, there seems to be no good reason whatever for restricting or forbidding the right of the owner of personal property, if not real, to transfer the same upon such trusts and by such a deed or instrument as the one before us, where the title and possession are given to the trustee for the use of the beneficiaries named, reserving the income and profits, and the principal, if necessary, and only to the extent necessary, for the grantor's maintenance.

Judgment affirmed.

No. 9871.

CARMICHAEL ET UX. v. COX.

SUPREME COURT.—*New Trial.*—*Weight of Evidence.*—The doctrine is of universal application that the Supreme Court will not disturb a verdict or finding on the evidence, if there be parol evidence tending to support it.

From the Marion Circuit Court.

L. M. Campbell, for appellants.

L. Ritter, E. F. Ritter and *B. W. Ritter*, for appellee.

BICKNELL, C. C.—This was a suit to recover the possession of land and damages for its detention.

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The complaint is in two paragraphs; the first is in the statutory form, alleging that the plaintiff Rebecca is the owner of the land.

The second states the particulars of said Rebecca's title, and the particulars of the defendant's alleged wrongful possession, and avers that the defendant, before suit brought, was duly notified in writing on the 4th day of November, 1874, to surrender and deliver up the possession of said land on the 7th day of March, 1875, and that he refused so to do, claiming to be himself the owner of the land. This paragraph demands a decree that the plaintiff Rebecca is the owner of the land in fee simple and entitled to the possession thereof, and that defendant has no interest therein, and that plaintiff may have judgment for possession, quieting of title and general relief.

The defendant answered in two paragraphs:

1st. The general denial.

2d. That in 1849 Harmon Cox owned the land and agreed to convey it to defendant for \$50, which the defendant paid; that said Harmon put defendant in possession and had the land transferred to defendant on the tax books; that defendant has been in possession ever since, claiming title, and has made valuable improvements thereon and paid all the taxes; that his claim of title was made with the knowledge and consent of said Harmon, and that said Rebecca took her conveyance of one-half of said land with knowledge of defendant's said title.

The defendant also filed a cross complaint, alleging the same facts set up in the said second paragraph of answer, claiming adverse possession for more than twenty years before suit brought, and praying that his title be quieted as against plaintiff's claim, and for all proper relief.

The plaintiff replied in denial of the second paragraph of answer, and answered in denial of the cross complaint.

The court tried the issues, and at plaintiff's request made

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a special finding of the facts and stated conclusions of law thereon as follows:

“That previous to the —— day of March, 1849, Harmon Cox was the owner of the land described in the complaint; that on said date he put the defendant Ezra H. Cox, his son, in possession of said land under an agreement that, if Ezra would pay him \$50, he should have the land as an advancement, and that he would deed the same to him, said Ezra; that afterwards said Ezra paid him said \$50, and has held possession of said land, claiming the same as his own, continuously from said date until the present time, and has paid the taxes and made lasting and valuable improvements thereon, and has exercised exclusive control thereof; that said Harmon never made the deed to said Ezra as he agreed to do; that on the 1st day of April, 1872, and while said Ezra H. Cox was in possession of and claiming ownership of the land, said Harmon Cox conveyed the land in dispute to the plaintiff Rebecca Carmichael by warranty deed, in consideration of natural love and affection and as an advancement from his estate, she being a granddaughter of said Harmon Cox; that the plaintiffs commenced suit for the possession of this property on the 2d day of December, 1872, and on the 11th day of December, 1874, dismissed said suit and commenced this action on the 22d day of May, 1875.

“From these facts the court finds as conclusions of law, that the plaintiffs have no vested title to the real estate in controversy, and are not entitled to recover in this action. The court, therefore, finds for the defendant Ezra H. Cox, and that he is the owner of the land described in the complaint, to wit,” etc., “and should have his title thereto quieted.”

The plaintiffs moved for a new trial and filed the following reasons therefor:

1. Because the decision of the court is not sustained by sufficient evidence.
2. Because the decision and judgment of the court is contrary to law.

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This motion was overruled, and judgment was rendered against the plaintiffs for costs and quieting the defendant's title. The plaintiffs appealed. The only error assigned is overruling the motion for a new trial.

The counsel for appellants says in his brief: "Counsel is well aware of numerous decisions of this court to the effect that where there is any legal evidence which tends to support the finding or verdict in the trial court, the judgment will not be reversed," etc., and he also says that, "as there is no question of veracity or impeachment, and no reason why this court can not as well and fully weigh and determine the evidence as the circuit court, it is respectfully maintained that the rule in the class of cases above referred to does not apply." The rule, to which counsel thus refers, is a rule of universal application, where there is parol testimony tending to support the finding, and we can not make this case an exception to it.

We have examined the testimony; there was evidence tending to support the finding of the trial court in every material point. There was no error in overruling the motion for a new trial. The judgment of the court below ought to be affirmed. *Knowlton v. Mendenhall*, 79 Ind. 422.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

No. 9281.

WRIGHT v. ABBOTT.

PRACTICE.—*Supreme Court.*—*Waiver.*—*Brief.*—A reason assigned as a cause for a new trial, but not discussed in appellant's brief, is considered waived. SAME.—*Burden of Proof.*—*Open and Close.*—*Payment.*—A plea of payment to an action on account, where no admission of the plaintiff's cause of ac-

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tion is made, does not entitle the defendant to open and close the evidence and argument upon the trial, the burden of the issue being upon the plaintiff.

SAME.—Instruction.—New Trial.—Assignment of Error.—An assignment of error based upon the overruling of a motion for a new trial, which motion assigned as a cause therefor, “that the court erred in refusing the instruction asked for by defendant,” is too general to be considered by the Supreme Court.

SAME.—Presumption.—Where the instructions given are not in the record, the Supreme Court will presume that other instructions asked were properly refused.

From the Cass Circuit Court.

W. Wright, for appellant.

M. D. Fansler, for appellee.

FRANKLIN, C.—Appellee sued appellant before a justice of the peace, on an account for work and labor. Appellant filed an answer of payment. There was a trial and judgment before the justice of the peace in favor of appellee, for \$46.87. On an appeal to the circuit court the cause was tried before a jury, and there was a verdict and judgment rendered in favor of appellee for \$63.60.

The following errors have been assigned in this court:

1st. In refusing to grant to the defendant the right to open and close the testimony and the argument.

2d. In refusing to give instructions asked.

3d. In overruling the motion for a new trial.

The first error is not the subject of an assignment of errors, but should be stated as a reason in the motion for a new trial. The second error, in relation to instructions, is in the same condition.

The following are the reasons stated for a new trial:

“1st. The verdict of the jury is contrary to the law and evidence in the case.

“2d. The court erred in refusing the record in the case of *Williams v. Wright*, in superior court, to impeach the testimony of John and Elizabeth Williams on trial.

“3d. The court erred in refusing the defendant the opening

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and closing of the case before the jury on the plea of payment.

“4th. The court erred in refusing the instructions asked for by the defendant.

“5th. The court erred in suffering the plaintiff’s counsel commenting to jury on cases before tried, and not in evidence, after defendant’s objection.

“6th. The verdict of the jury is erroneous in damages.”

The evidence was conflicting, but tended to support the verdict, and it was not, therefore, contrary to the evidence nor the law.

The second reason is not referred to by appellant in his brief, and is, therefore, waived. As to the third reason, the cause having originated before a justice of the peace, the answer of payment contained no admission of plaintiff’s cause of action; and, without any evidence, the court would have been bound to find for the defendant. The burden of proof was, therefore, upon the plaintiff, and he had a right to open and close the testimony and argument in the trial of the cause. Sec. 324 of the Code; *Judah v. Trustees of Vincennes University*, 23 Ind. 272; *Baltimore, etc., R. R. Co. v. McWhinney*, 36 Ind. 436.

There was no error in refusing to grant the defendant leave to open and close the testimony and the argument of the cause.

The fourth reason is too general to require consideration, nor were the instructions asked signed by appellant or his counsel; and, as the instructions which were given are not in the record, we must presume that the court had sufficiently instructed the jury, and, without any reason being shown to the contrary, had properly rejected the instructions asked. *Freeze v. DePuy*, 57 Ind. 188; *Coryell v. Stone*, 62 Ind. 307; *Stott v. Smith*, 70 Ind. 298; *Smith v. Kyler*, 74 Ind. 575.

There was no error in refusing the instructions asked.

The fifth reason is not embraced in the record, by bill of exceptions or otherwise.

The sixth reason, that the verdict is erroneous in damages, is too general to present any question for decision.

Davis v. Davis.

There is no error in overruling the motion for a new trial.
We find no error in this record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things affirmed, with costs.

Opinion filed at the May term, 1882.

Petition for a rehearing overruled at the November term, 1882.

No. 9413.

DAVIS v. DAVIS.

HUSBAND AND WIFE.—*Wife's Personal Services*.—Before the act of 1879 the personal services and earnings of a wife belonged to the husband.

SAME.—*Promise to Wife*.—*Maintenance of Child in Family*.—Where a man and woman, owning adjoining farms, marry, and, dwelling in the house of the wife, live upon the products of both farms indiscriminately, maintaining as a member of their family a grandchild of the husband, the wife can not (after the death of the husband) maintain an action against the child's father upon his promise made to her to pay her for caring for and maintaining the child.

PARENT AND CHILD.—*Contract with Grandparent for Child's Maintenance not Implied*.—Where a child is taken to be brought up in the family of its grandfather, the father, without express promise, is not liable for the child's maintenance.

From the Hendricks Circuit Court.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellant.

L. M. Campbell and J. T. Burns, for appellee.

WOODS, C. J.—The appellee sued the appellant upon an alleged express and upon an implied promise to pay to her reasonable compensation for taking the "custody and care of Charles Davis, an infant son of the appellant, and for boarding, nursing and clothing him."

The appellant answered by pleas of general denial, six years'

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limitation, and special matter, provable under the general denial. Reply in general denial.

The testimony of the appellee shows, that, in 1860, being a widow, possessed of one hundred acres of land, part of which was under cultivation, she married James Davis, the appellant's father, who owned a farm, adjacent to hers, of near three hundred acres. She was then about forty-one years old and he fifty-seven or more, and each had minor children. After the marriage they lived with their children upon her land until James Davis died; he died December 7th, 1878. In March, 1867, the wife of the appellant died, leaving an infant son about one year old, named Charles. Two or three days before the death of his mother, the child had been taken to the house of the appellee and her husband, and remained there until June, 1880. Immediately after the funeral of his wife, the appellant told the appellee if she would take the child and take care of him he would pay her for it. She accordingly did board him and care for him for more than thirteen years, the service being well worth \$75 per year during that time. The lands of the appellee and her husband were farmed as one farm, the family living in the house of the appellee. The boy worked some on the place after he got old enough, plowing corn, carrying in wood, helping to milk, and doing such things as he could and was disposed to do. His clothing was furnished there in the family. The appellee had poultry, cows, and orchard, sold apples, butter and eggs, and bought all of the clothing for the boy after her husband's death. His father bought nothing for him. The boy lived with the appellee, and she furnished him a home and shelter under her own roof, and kept him for eighteen months after James Davis died, the boy being sick with catarrh in the head a greater part of that time, under the doctor's hands, and unable to go to school.

The appellant, testifying in his own behalf, denied the promise to pay for the care and nursing of the boy, and offered other testimony besides his own tending very strongly to show, but denied by the appellee, that during the last sick-

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ness of the mother, the appellee being present, the child was given by the mother, the appellant consenting, to the grandfather, to be taken and reared as one of his own children, and upon this understanding and agreement the child was taken into the family of the appellee and her husband, and was kept as a member of the family until the death of the grandfather, when the appellant proposed to take him to his own home, but, at the request of the appellee, permitted him to remain with her, awaiting the return of her own absent son; and that during the time he so remained with the appellee, his work and services to her were worth more than his keeping.

It is very plain upon the testimony of the appellee that there was no cause of action in her favor for anything done or furnished for the boy during the life of her husband, to whom, if to any one, the cause of action belonged. *Baxter v. Prickett's Adm'r*, 27 Ind. 490; *Yopst v. Yopst*, 51 Ind. 61.

Conceding the right of the appellee to recover for the value of her services and for the shelter and maintenance of the boy after her husband's death, we are compelled to say that the damages awarded, to wit, \$350, are excessive. We are also of opinion that the instructions complained of were erroneous because, if for no other reason, not applicable to the evidence. They were as follows:

"1st. The wife of the defendant had no power under the law to give away his child to the husband of the plaintiff or to any one else, and such an agreement, if made, did not deprive the father of the right to its custody, nor release him from his obligation to maintain it during its minority.

"5th. The lands of a married woman and the profits thereof are her separate property under the law, and if the plaintiff maintained the child of the defendant in whole or in part from the proceeds of her own land, under a contract express or implied between herself and the defendant, then she would be entitled to recover any amount due for the same, although she were married during part of the time of rendering the service."

This last instruction is plainly objectionable because of its

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confusion of ideas—beginning with reference to maintaining the child from the products of the appellee's land and ending with "rendering the service,"—leaving the jury free to allow for the service. It could have had no other effect in this case, as there was no evidence that the appellee furnished to the child any of the separate products of her own land; and if it was meant to tell the jury that, under the circumstances shown in this case—the appellee and her husband occupying the house on her land, but farming her land and his as one farm, mixing the products indiscriminately—she could recover for a proportionate part, to be guessed at by the jury, without any evidence what that part was, or of what it was worth, it was just as clearly wrong.

As to the first instruction, if the evidence showed a giving of the child to the grandfather, it was with the consent of the father, and the giving was as much his act as that of the mother; and, if taken and kept under such an agreement, there could, of course, be no right to compensation for the keeping. Indeed, if the mother, without the consent of the appellant, had given the child to the grandfather, and he had taken it to bring up as a member of his family, he would have had no right of action against the appellant for the service rendered, and certainly no right of action could have arisen out of the transaction in favor of the appellee.

The court, perhaps, meant to convey the idea that, notwithstanding such giving away of the child by the mother, yet the father's duty to maintain continued, and would support his subsequent express promise to pay for the child's maintenance; but, from the instruction as given, the jury was likely to have understood that the father's duty to the child bound him to pay for its support, without any express promise, notwithstanding it was taken under the supposed agreement with the mother—which clearly is not the law.

Judgment reversed, with costs and with instructions to grant a new trial.

Louthain *et al.* v. Miller.

No. 7797.

LOUTHAIN ET AL. v. MILLER.

VERDICT.—*Special Findings.*—*Practice.*—*Evidence.*—An inconsistency between a general verdict and the answers by the jury to special questions of fact, which will justify a verdict upon the latter against the former, must be irreconcilable in view of the pleadings alone, without reference to the evidence.

CHATTEL MORTGAGE.—*Consideration.*—A chattel mortgage to secure a pre-existing debt is supported by a sufficient consideration, except as against a prior equity.

SAME.—*Fraud.*—*Question of Fact.*—An agreement between the mortgagor and mortgagee of a chattel, that the former may sell the chattel, is not, as a matter of law, fraudulent, but the question of fraud is one of fact for the jury.

WRITTEN INSTRUMENT.—*Construction.*—*Instruction.*—The construction of a written instrument is for the court, and when by the face of the instrument it is so the court may tell the jury that “upon its face it purports to be executed for an honest purpose.”

EXECUTION.—*Levy.*—*Chattel Mortgage.*—*Replevin.*—The sheriff may, by reason of the statute, R. S. 1881, section 722, levy upon and seize property which is under chattel mortgage, and is not thereby subject to an action of replevin at the suit of the mortgagee.

From the Superior Court of Cass County.

D. C. Justice and *D. B. McConnell*, for appellants.

S. T. McConnell and *T. J. Tuley*, for appellee.

ELLIOTT, J.—This is an action of replevin prosecuted by the appellee against the appellants.

The trial was by jury, and resulted in a verdict for the appellee. Interrogatories were propounded to the jury, and answers made to them as follows:

“1st. At the time Heffner executed the mortgage in controversy, did not Miller execute back to him written authority to sell the articles mortgaged, and, when sold, the mortgage was to be discharged, as to the articles sold? Ans. Yes.

“2d. Was not Miller also consenting that Heffner should sell any of the articles mortgaged in the usual retail way, replac-

85	161
130	148
130	174
85	161
144	231
145	604
146	330
85	161
148	95

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ing the article sold with another of like character, and use the proceeds as he saw fit? Ans. No.

“3d. Did Miller ever call Heffner to an account for the proceeds of the sale of any of the articles mortgaged? Ans. No.

“4th. Was not Heffner to have control of the stock, to sell it in the usual retail way, for all intents and purposes of his own? Ans. No.

“5th. Was not Heffner, by the terms of the mortgage and the written agreement executed at the time, authorized and empowered to retain possession of the goods mortgaged, and sell them, discharged of the mortgage, without limitation Ans. No.

“6th. Was it not agreed between Heffner and Miller, at the time of the making of the mortgage, that Heffner was to retain possession of the property and sell the same, in the usual course of trade, at retail, and apply a portion of the proceeds thereof to the payment of claims not mentioned in the mortgage? Ans. Yes.”

The appellants moved for judgment on the answers of the jury, notwithstanding the general verdict. This motion was overruled, as was also a motion for a new trial, and judgment was rendered on the general verdict.

The appellants insist that they are entitled to judgment on the answers, notwithstanding the general verdict, for the reason that the facts found show the mortgage to be void. It is a familiar principle that judgment will be given on the answers to interrogatories only in cases where there is an irreconcilable conflict between them and the general verdict. There is no such conflict here. For anything that appears in the pleadings, answers or verdict, the appellee's title may be founded upon a right altogether different and distinct from that created by the mortgage mentioned by the jury in their answers. *Stevens v. City of Logansport*, 76 Ind. 498. There is, therefore, upon the face of the verdict and the answers no

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inconsistency, much less an irreconcilable antagonism. Questions as to the sufficiency of a verdict and as to whether there is an inconsistency between the general verdict and answers to interrogatories must be determined from the face of the record.

The evidence shows that the appellee claimed title through a chattel mortgage executed to him by Nathan Heffner, and that the appellants claimed it under executions issued against the mortgagor.

It is insisted, that, as the mortgage was executed to secure a pre-existing debt which Heffner owed the appellee, it is not supported by a sufficient consideration, and we are referred to *Busenbarke v. Ramey*, 53 Ind. 499; *Gilchrist v. Gough*, 63 Ind. 576; *Davis v. Newcomb*, 72 Ind. 413. We do not regard the cases as declaring the doctrine for which appellants contend. We understand them to hold that a pre-existing debt is not such a consideration as will make a purchaser a *bona fide* one in such a sense as to cut off prior equities; but we do not understand them to hold that an antecedent debt may not constitute a valuable consideration. We have no doubt that an antecedent debt is a valuable consideration, and that it will support a mortgage or other contract. *Hewitt v. Powers*, 84 Ind. 295; *Jones Chattel Mortg.*, section 81.

The mortgage is said to be fraudulent, for the reason that there was an agreement between the mortgagor and mortgagee that the former might sell the mortgaged property; but this position can not be maintained. It is now well settled, that in such cases as the present the question of fraud is one of fact for the jury, and not one of law to be decided by the court. *Morris v. Stern*, 80 Ind. 227; *McLaughlin v. Ward*, 77 Ind. 383; *Lockwood v. Harding*, 79 Ind. 129; *Rose v. Colter*, 76 Ind. 590.

The court told the jury in one of its instructions, that "the mortgage upon its face purports to be executed for an honest purpose," and committed no error in making this statement.

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The construction of written instruments is a matter for the court, and it does no wrong in informing the jury of the effect of the language used in the instrument in cases where there is no question as to its execution, and no dispute as to what provisions it contains.

We think the judgment must be reversed, for the reason that it was not shown that the appellants had tortiously seized or unlawfully detained the property in controversy. Appellee's claim to the property rested entirely on the mortgage executed to him by Heffner, and the right conferred by this mortgage did not preclude the execution plaintiffs from levying upon and taking possession of the property. The lien of the mortgage is not, to be sure, destroyed by such levy, but the interest of the mortgagor is covered by it. It has been held in many cases that property embraced in a chattel mortgage may be levied upon and taken into the possession of the sheriff under executions against the mortgagor. *Hackleman v. Goodman*, 75 Ind. 202; *Manns v. Brookville Nat'l Bank*, 73 Ind. 243; *Olds v. Andrews*, 66 Ind. 147; *Raymond v. Parisho*, 70 Ind. 256; *Sparks v. Compton*, 70 Ind. 393; *Mobley v. Letts*, 61 Ind. 11; *Heimberger v. Boyd*, 18 Ind. 420; *Schrader v. Wolflin*, 21 Ind. 238; *Sidener v. Bible*, 43 Ind. 230. In *Heimberger v. Boyd*, *supra*, it was said: "And, as we construe the statute above recited, it makes such right of redemption a leviabie interest which may be sold on execution. It follows, the sheriff had a perfect right to seize and possess the property, preparatory to the sale of the mortgagor's interest. *Stief v. Hart*, 1 Comstock, 20. And the statute, as we have seen, effectively protects the rights of the mortgagee, by withholding possession from the purchaser, at such sheriff's sale, until he complies with the conditions of the mortgage."

Judgment reversed.

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No. 9706.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY v. SPONIER.

85	165
134	608
85	165
137	91

NEGLIGENCE.—Evidence.—In an action against a railroad company for placing a hand-car upon a public highway, in consequence of which the plaintiff was injured while passing over the highway at night, evidence tending to show that the defendant's servants, while executing the lawful orders of the defendant, negligently left the car on the highway, is admissible.

SAME.—Personal Injury.—Measure of Damages.—In a suit for personal injury, resulting from negligence, the jury should consider the bodily pain and sickness, the extent of permanent disability, and the anxiety and distress of mind fairly caused by the injury.

SAME.—Excessive Damages.—An old lady aged sixty-two, by the defendant's negligence, without intention, was injured by having the bones of an arm broken, which resulted in a protracted effort at cure, without success, so that she could never again perform her usual domestic duties.

Held, that a verdict for \$2,500 damages was not so excessive as to justify a new trial.

INSTRUCTIONS.—Evidence.—An instruction which recites a part of the evidence, and tells the jury that, if they believe it, then the act complained of was not the act of the defendant, ought not to be given, if there was other evidence upon the same point consistent with that recited, which tended to show that the act was that of the defendant.

SAME.—It is not error to refuse a correct instruction if its substance be given in another form.

SAME.—Verbal omissions and errors in an instruction, which impair its literal accuracy, but can not be supposed to mislead the jury—e. g., omitting to specify a certain time, which is nevertheless clearly implied—do not constitute an available objection.

SAME.—The court may properly state to the jury that there was evidence tending to prove a given fact; it may even recapitulate the evidence and say what it conduces to prove, if the jury be also told that they must determine for themselves what it does really establish.

NEW TRIAL.—Surprise.—Witness.—It is not ordinary prudence to rely upon the unsworn statement of an adversary's witness as to what will be his testimony; and surprise resulting from such reliance, whereby a party goes to trial without witnesses to prove the real truth, is not cause for a new trial.

From the Porter Circuit Court.

N. O. Ross, for appellant.

Pittsburgh, Cincinnati and St. Louis Railway Company v. Sponier.

BICKNELL, C. C.—This suit was commenced in the Lake Circuit Court and was taken to the Porter Circuit Court by change of venue.

It was brought by John Sponier and Catherine, his wife, for injuries sustained by Catherine by the wrongful act of the defendant in placing a hand-car on a bridge, which was part of a highway crossing a ditch within the limits of the defendant's right of way.

The complaint alleged that the defendant, on a dark night, negligently, wrongfully, unlawfully and wilfully put the hand-car on the bridge, so that a team could not pass over the bridge, and that the plaintiffs were travelling along the highway in a two-horse wagon, without notice of the obstruction, and unable to see it because of the darkness, and that, in trying to drive over the bridge, their wagon, without any fault of theirs, struck the hand-car, and, with the plaintiffs, was thrown off the bridge, breaking an arm and dislocating a shoulder of the plaintiff Catherine, and producing internal injuries by which she was confined to her bed for six months, and permanently disabled from attending to her household duties, to the damage of the plaintiffs \$3,000.

The suit was dismissed, on plaintiff's motion, as to John Sponier. The defendant answered in two paragraphs:

1. The general denial.
2. As to the permanent injuries, that they were the result, exclusively, of said Catherine's gross negligence in failing to take proper care of herself.

There was a reply in denial of said second paragraph. A jury returned a verdict for the plaintiff with \$2,500 damages. The defendant's motion for a new trial was overruled, judgment was rendered on the verdict, and the defendant appealed. The error relied on is overruling the motion for a new trial. The reasons assigned for such motion were:

1. Permitting the plaintiff to ask George Foster, and in permitting him to answer, the following question: "What did you do, in the fall of 1879, with reference to clearing off

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the right of way of rubbish and dry grass by fire?" His answer was, "I burnt off some ties and rubbish and dry grass; I got orders to do it every fall from the railroad company."

There had been testimony tending to show that the bridge was on a public highway which crossed the railroad; that there was a ditch on each side of the railroad within the limits of the defendant's right of way; that the right of way was 100 feet wide; that said ditches were from four to six feet deep, and were crossed by plank bridges about fourteen feet wide; that the railroad was six feet higher than the level ground on each side, and that there was grass growing on each side of the right of way, and that the defendant had made the bridges about sixteen years before, and had always kept them in repair until the last spring, when the township trustee took charge of them; that George Foster was the defendant's section boss for that part of the railroad, and had charge of the hand-car, which he kept at the place where he lived.

It was competent for the plaintiff to show that Foster's duty was to burn off the dry grass and rubbish on the right of way, to prevent fire from sparks spreading over to the grass lands on each side, and then to show that, in the performance of that duty, he or his hands had negligently left the hand-car in the highway, and partly on the bridge.

There was no error in permitting said question and answer.

The second reason for a new trial is the refusal by the court of instructions Nos. 2 and 4, asked for by defendant. No. 2 was as follows:

"2. If you find that George Foster was a section foreman on defendant's road, and had charge of the hand-car that caused the injury, and that Jacob Moss, one of the section men who worked under him, went with John Triner and his employees, after working hours, and after said Moss had quit working for defendant for that day, and placed the hand-car in the highway as complained of, while assisting John Triner to burn off the right of way to protect his hay, said Moss would not be then in the service of the defendant, nor would

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defendant be liable for his act in placing or assisting to place said hand-car upon the highway."

The question here was, whether the hand-car was in charge of the section boss and his hands, or in charge of John Triner; this was a question of fact to be determined by the jury upon all the evidence; whether the grass was burned at night, after ordinary working hours, was not material, if it was done under the direction of the section boss, in fulfilment of his duty to the defendant. It would have been error to tell the jury that, if the facts stated in this instruction were proved, "said Moss would not be in the service of the defendant," because, notwithstanding such facts, the other evidence might satisfy the jury that the work was really done by the section boss, and that he directed Moss to take the hand-car and do it; the section boss had testified that he burned off that rubbish and dry grass under the order of the defendant. There was no error in refusing this instruction.

Instruction No. 4, asked for by defendant, was as follows:

"One of the important questions is, whether the defendant, by its agents or employees, placed the hand-car that caused the injury, in the highway? The plaintiff alleges it did; the defendant denies it; this puts the burden of proof to establish that fact, by a preponderance of the evidence, upon the plaintiff, and if you find that the proof is equally balanced on this question, then you should find for the defendant."

There was no error in refusing this instruction, because the court gave other instructions upon the same subject equally favorable to the defendant, as follows:

The court, in its first instruction, after stating the three essential questions of fact in the case, one of which was, "Did the defendant put the hand-car on the bridge as charged?" told the jury, that "these issues are made by the plaintiff, and the law is that she must prove each material allegation of her complaint by a preponderance of the evidence." After telling the jury that they can not find for the plaintiff without a preponderance of evidence in her favor, upon a stated ques-

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tion, it would be mere surplusage to add, if there is no preponderance you should find for the defendant. *Blizzard v. Applegate*, 77 Ind. 516.

The third reason for a new trial is, that the court erred in giving instructions Nos. 2, 3 and 4.

The second instruction is as follows:

“*Second.* A railroad company is liable for the acts of its employees or servants, done in the prosecution of the company’s business and within the scope of the authority given them. And so one of the important questions you are called on to decide is, whether the defendant, by its agents or employees, placed the hand-car that caused the injury on the highway? The true test is not the form of the employment, whether by the day or by the month, but whether the men, who left the car on the highway, were under the control and direction of the defendant, so that they were its servants, and not the servants of another.”

The objection made to this instruction is that the words, “were under the control and direction of the defendant,” were misleading, because not confined to the time of the act done, nor to an act within the scope of the employment. This objection can not be sustained; the instruction clearly refers to no other time than the time of the act done, and to no other business than the business of the company, within the scope of the employment of the servants.

The third instruction given by the court is:

“*Third.* Evidence has been introduced tending to prove that one Foster had charge of a section of the defendant’s road, extending over the place of the injury, and that he was charged with the duty of burning off the dry grass and rubbish along the right of way, at such times and under such circumstances as he thought best and proper for doing such work; and that, at the time of the injury, one or more men under his charge as section men, together with others not under his control, took the car from Schererville to the place of the alleged injury, and there put it off in the highway

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while they were engaged in burning off the defendant's right of way, by reason of which the injury occurred. On this I instruct you, that if you find from the evidence that the defendant, by its section boss or those under his charge, were at the time engaged in the business of burning off dry grass on its right of way, and that this work was required by the defendant from such section boss under his general employment, and at the time of the injury he, or those under his direction, were engaged in performing such work, then the presumption arises that he was acting under the instructions of the defendant, and the burden of proof would be on the defendant to show that they were not so acting."

The objection to this charge is that the court had no right to say what the evidence tended to prove. The language of the court is, "there was evidence tending to prove" and "if you find from the evidence." The court had a right to do more than that; it might have recapitulated the evidence and have stated what it might conduce to prove, leaving its weight to be determined by the jury. *Ball v. Cor*, 7 Ind. 453, 458. The court has no right to say what the testimony proves, nor to assume that anything is proved, but may say that "there was testimony tending to prove," when the jury are distinctly told, as they were in this case, that they must determine for themselves what actually was proved. There was really no conflict as to any of the matters which this instruction stated the evidence tended to prove; so that the instruction, even if erroneous, could have done no harm.

It is also objected that the latter part of this instruction told the jury that the burden of proof in the case was changed from the plaintiff to the defendant; but that is not the meaning of the language; the statement is that, if the jury should find from the evidence certain specified facts, they might infer that the work was done under the instructions of the defendant, unless such presumption was overcome by the testimony on behalf of the defendant. The substance of it is, not that the burden of proof in the cause is changed from the plaintiff

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to the defendant, but that, where the plaintiff's evidence makes out a *prima facie* case, that is sufficient, unless it is destroyed by the defendant's evidence. *Meikel v. State Savings Institution*, 36 Ind. 355, 359; *Hayes v. Fitch*, 47 Ind. 21; *Fay v. Burditt*, 81 Ind. 433, 443. There was nothing in this instruction apt to mislead the jury, or warranting the reversal of the cause. *Browning v. Hight*, 78 Ind. 257; *Backus v. Gallentine*, 76 Ind. 367.

The fourth instruction given by the court was:

"*Fourth.* If you find for the plaintiff you will be required to determine the amount of her damages. On this subject I instruct you that, in estimating the damages, you will consider her bodily pain and suffering occasioned by the injury, or any sickness resulting from the injury; and, in case you find that the plaintiff has not yet recovered from her alleged injuries, or that by such injury she has to any extent been permanently disabled, then you should take such facts also into consideration in estimating her damages, to which you may add such an amount as you, in the exercise of a sound discretion, may think will be a just compensation for her anxiety and distress of mind, as are fairly and reasonably the plain consequences of the injury complained of."

There was no error in this instruction. *Wright v. Compton*, 53 Ind. 337; *City of Indianapolis v. Scott*, 72 Ind. 196. The instructions taken together very fully and fairly stated to the jury the law applicable to the evidence. *Colee v. State*, 75 Ind. 511.

The fourth cause for a new trial was surprise on the trial, which ordinary prudence could not guard against.

It appears that some agent of the defendant had been in communication with one of the plaintiff's witnesses, and had procured from him a written statement of what his testimony would be; the statement was:

"John Triner sent me to George Foster, section foreman, to get the hand-car and go along with them, or, if he could not go, he should let us have it."

The witness, when sworn, testified: "John Triner sent

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me down to find out whether Foster was going to burn off the right of way ; Moss went by Foster's orders ; Foster told Moss to go down to burn off the right of way ; I did not ask for the car for Triner." Being shown the statement, which the defendant's agent had procured him to sign, he said : " I signed this paper ; I heard it read before I signed it ; it was not read to me as it reads now ; the paper was read to me ' whether he was going to burn off the right of way.' "

In support of this cause for a new trial, it was shown by affidavit that the facts contained in the written statement could be proved by the testimony of Jacob Moss, who was absent in Iowa or Minnesota ; and that the defendant's attorney, relying on said written statement, went into trial without asking for a continuance on account of the absence of Moss, and that the defendant could prove by Moss that he was not sent by Foster, but went with Triner and his men to help them.

It has been held, that, as a general rule, neither party is entitled to a new trial because he was surprised by the testimony of the adverse party ; *Cummins v. Walden*, 4 Blackf. 307 ; *Travis v. Barkhurst*, 4 Ind. 171 ; nor because he was surprised by the testimony of his own witness. *Graeter v. Fowler*, 7 Blackf. 554 ; *Ruger v. Bungan*, 10 Ind. 451 ; *Guard v. Risk*, 11 Ind. 156 ; *Brownlee v. Kenneipp*, 41 Ind. 216.

In *Todd v. State*, 25 Ind. 212, however, a new trial was granted, where the defendant was surprised because his own witness stated on the trial facts contrary to what he had previously stated to defendant's counsel.

And it has been held, that where a party to a suit, in order to influence the action of his adversary, tells him that certain facts will not be controverted on the trial, and the latter relies on such statement, and omits to produce witnesses to prove such facts, he may be entitled to a new trial on the ground of surprise which ordinary prudence could not guard against. *Haynes v. State, ex rel.*, 45 Ind. 424. But it is not ordinary prudence to rely on the unsworn statement of your adversary's witness, as to what he will testify at the trial.

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Besides, in this case it does not appear that if the witness, on the trial, had sworn to the alleged previous statement, the result of the trial would have been thereby changed. *Cox v. Hutchings*, 21 Ind. 219. And the statement was not proved as alleged; the witness denied that he had made such a statement. There was no cause for a new trial on the ground of surprise.

The sixth and seventh causes for a new trial are, that the verdict was not sustained by sufficient evidence, and is contrary to law. The appellant, in his brief, confines his argument to the question of the sufficiency of the evidence. There was evidence tending to sustain the verdict; therefore, it can not be disturbed here. *Becker v. Denmure*, 78 Ind. 147.

The only remaining cause for a new trial is excessive damages.

The evidence shows a case of negligence not combined with intentional wrong. The jury gave \$2,500 damages, of which \$500 were allowed for physical and mental injury, and \$2,000 for permanent disability. The plaintiff at the time of the injury was sixty-two years old; the only permanent disability proved was a disability to do ordinary household work. The plaintiff testified, "I did my own housework before the accident; I can not do it now, except to hold a little child in my lap." Dr. Jones testified: "Owing to old age and previous sickness, the broken bones of the arm did not readily unite, and it was necessary to keep the bandages on tight for a long time, and the arm became very much withered, as it now appears; it will never become well again; she will never be able to do housework with it."

In general, courts will not interfere with the verdict of a jury, on the ground of excessive damages, unless the damages are so great as to appear at first blush to be outrageous; or such as indicate that they were the result of partiality or prejudice, and not of deliberate judgment. *Farman v. Lau-man*, 73 Ind. 568. The jury has a very broad discretion on the subject of damages. *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98). It is the judgment of the jury, and not the

 McClain v. Sullivan *et al.*

judgment of the court, which is to assess the damages in actions for personal torts and injuries. *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134). We can not disturb the judgment on the ground of excessive damages. *Baltimore, etc., R. W. Co. v. Pixley*, 61 Ind. 22. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

 No. 9423.

McCLAIN v. SULLIVAN ET AL.

REDEMPTION.—*Judgment.*—*Mortgage.*—*Priority of Liens.*—*Merger.*—*Conveyance.*—*Assignment.*—*Judgment Creditor.*—A., owning certain real estate, mortgaged it to B., and then conveyed it to C., after which C. mortgaged it to D., and thereafter E. recovered two judgments against C. which became liens upon the land; E. purchased the land upon the first judgment rendered, obtained a deed and conveyed the land to F., who thereafter redeemed, under the act of June 4th, 1861, from a sale made upon the mortgage executed to B., and who paid taxes accrued upon the land, then brought an action to have a lien declared upon the land as against D., the second mortgagee, for the amount of money paid in redemption of the property from the sale of B., and for the amount paid for taxes. *Held*, that the lien of E., by virtue of his second judgment, was not merged in the legal title acquired by his purchase under the first judgment, and that notwithstanding the title thus acquired he was still a judgment creditor and entitled to redeem the property from such foreclosure sale. *Held*, also, that the conveyance of the property thereafter by E. to F. operated as an assignment of said judgment, and that F. was thereafter authorized to redeem from such sale. *Held*, also, that the lien acquired by the redemption was prior to the lien of D., the second mortgagee, though his lien was prior to the lien of the judgment by virtue of which the redemption was made.

PRACTICE.—*Judgment.*—*Exception.*—*Recital by Clerk.*—The recital of the clerk, following the entry of a judgment, that objection was made and exception taken to the rendition thereof, is not sufficient to present any question concerning the decree in the Supreme Court.

From the Superior Court of Marion County.

85	174
136	95
85	174
140	833
85	174
146	698

McClain v. Sullivan *et al.*

A. F. Denny and *L. D. McClain*, for appellant.

J. B. Elam, for appellees.

BEST, C.—This action was brought by the appellee Samuel Sullivan, to enforce a lien upon the premises in the complaint described, for taxes paid and for money expended in the redemption of such property from a foreclosure sale, against Mary McClain, a subsequent mortgagee, and against his co-appellees as subsequent lien-holders.

The facts out of which this controversy arises are, briefly, these: On the 17th day of May, 1873, Emily J. Connelly, who was then the owner of the real estate in the complaint described, executed a mortgage, in which her husband joined, to Jonathan M. Ridenour, to secure three notes of \$200 each, payable respectively in one, two and three years from that time; on July 28th, 1873, Emily J. Connelly and husband conveyed the real estate to William R. McClain, who, on the 4th day of June, 1875, executed a mortgage upon it to Mary McClain, his mother, to secure a note of \$2,715, payable five years from that time; on November 10th, 1875, Isaiah J. Shafer recovered a judgment for \$228 against William R. McClain; and on the 7th day of December, 1875, said Shafer recovered a judgment against said McClain for \$230.72, both of which became liens on said property at the time of their rendition; on the 18th of December, 1875, said property was duly sold upon the first judgment so recovered by said Shafer, and was purchased by him for \$261.39; on the 19th of April, 1876, William S. Hubbard, assignee of Jonathan M. Ridenour, brought an action to foreclose the mortgage made to Ridenour, making Mary McClain a defendant, and alleging in his complaint that “she claimed to hold a mortgage upon said real estate for \$2,715, dated June 4th, 1875, and which, if a lien at all, is junior and subordinate to the plaintiff’s claim, and that she had no such lien; and that the pretended mortgage was fraudulent.” Mary McClain was served with process, defaulted, and, on the 8th of May, 1876, the mortgage

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was foreclosed for \$495.20, and it was adjudged that Mary McClain "had no interest in or lien upon said real estate, and no right to redeem the same from the lien of the plaintiff's mortgage." On the 17th day of June, 1876, said premises were duly sold upon said decree to said Hubbard for \$544.04, and a certificate of purchase issued to him; on the 14th day of February, 1877, the premises were conveyed by the sheriff to Isaiah J. Shafer, in pursuance of the sale made to him upon his judgment, and, on the 14th day of June, 1877, he paid into the clerk's office \$598.15, in redemption of the property from the sale made to Hubbard as aforesaid, which money was accepted by said Hubbard in redemption of said property; on the 19th day of June, 1877, Isaiah J. Shafer and wife conveyed said premises, by deed of general warranty, to the appellee Sullivan, who, on the 2d of June, 1878, was compelled to and did pay \$203.50, as taxes upon said premises.

A demurrer, by Mary McClain, for the want of facts, was overruled to the complaint, which alleged, substantially, the foregoing facts. The other defendants disclaimed any interest in the property, and no question arises concerning them. Issues were formed, a trial had, and a finding made for the appellee Sullivan. A motion for a new trial was overruled, and a judgment rendered, adjudging that the appellee Sullivan had a lien upon the property for \$979.74 on account of taxes paid, and on account of the money paid in redemption of the property from the sale made to Hubbard as against the appellant, who has a mortgage upon said premises as above mentioned, and that she is entitled to redeem said premises from the liens of said appellee, by paying into court within sixty days the amount of said liens, with interest at ten per cent. and costs; otherwise the appellee Sullivan was to hold said property discharged from appellant's lien, and from any right of redemption by her.

Following this judgment, there is a recital that to each and every part thereof, separately, the appellant objected and excepted.

McClain v. Sullivan *et al.*

These rulings are assigned as error, and in support of the position that the judgment is erroneous, the appellant insists upon the following propositions :

First. That Shafer, by the redemption of the property, acquired no lien upon it, as he was at the time the owner of it under his purchase at sheriff's sale ;

Second. If Shafer did acquire a lien upon the property by such redemption, his conveyance of the property did not transfer such lien to the appellee ;

Third. If such lien was acquired by Shafer, and by him transferred to the appellee, the same is junior and subject to the lien of appellant ; and,

Fourth. If the lien was acquired by Shafer, has been transferred to the appellee, and is paramount to the appellant's lien, the court erred in limiting the appellant to sixty days within which to redeem said property from the lien of the appellee.

These propositions will be considered in the order of their statement.

The redemption in this case was made in pursuance of the provisions of the act of June 4th, 1861. The first section of that act provides that when any real estate shall be sold upon any execution or order of sale, the owner, or any mortgagee or judgment creditor having a lien upon the same, may redeem such property at any time within a year from the date of sale by paying to the purchaser, his heirs or assigns, or to the clerk of the court from which such execution or order of sale issued, the purchase-money, with interest thereon at ten per cent. per annum.

The third section provides, that " When any mortgagee or judgment creditor shall redeem any real property or any interest therein under the provisions of this act, such mortgagee or judgment creditor shall retain a lien on the premises for the amount of money so paid for redemption against the owner and any junior incumbrancer."

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This act authorizes the owner of real property thus sold to redeem it, but does not give him a lien upon it for such redemption money, and hence, if Isaiah J. Shafer sustained no relation to the realty in question other than that of owner, his redemption gave him no lien upon it. He recovered two judgments which were liens upon the realty, and, in satisfaction of one, it was sold and conveyed to him. The other judgment remained a lien, and Shafer was a judgment creditor; unless this lien was merged in the legal title acquired by his purchase. This is the appellant's position. In this we do not concur. It may be conceded that where a lien upon land is held, and the fee vests in the same person and in the same right, the lien merges in the fee simple. "But, notwithstanding this technical rule of law, it is well settled that a court of equity will keep an incumbrance alive, or consider it extinguished, as will best subserve the purposes of justice, and the actual and just intention of the party." *Howe v. Woodruff*, 12 Ind. 214. *Haggerty v. Byrne*, 75 Ind. 499.

The facts stated bring this case within this equitable rule, and the lien of Shafer must be regarded as a subsisting one, under which, by the express terms of the statute, he was authorized to redeem said premises. We are, therefore, of opinion that Shafer, by the redemption of the property, acquired a lien upon it for the amount of the redemption money.

Shafer having a lien upon the premises for such redemption money, his conveyance of them as stated operated as an assignment of such lien to the appellee. *Niles v. Ransford*, 1 Mich. 338; *Jackson v. Bowen*, 7 Cowen, 20.

The next proposition is that this lien is subordinate to the lien of the appellant's mortgage. The third section of the above recited statute provides that a creditor who redeems "shall retain a lien on the premises for the amount of money so paid for redemption against the owner and any junior incumbrancer;" and the appellant insists that the phrase "junior incumbrancer" means a person who holds a lien subsequent to the lien by virtue of which the redemption was made, and

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not a person who holds a senior lien thereto, though such lien is junior to the lien upon which the sale was made; and, therefore, as Shafer's judgment lien, which gave him the right to redeem, was junior to the appellant's mortgage, the lien acquired by him for such redemption money was also junior to the lien of appellant's mortgage.

This is not, as we believe, a proper construction of the statute. Such construction would practically preclude all incumbrancers from redeeming, unless they would pay all liens prior to the lien by virtue of which the redemption is made. This is not required either by the letter or spirit of the statute. Its purpose is to encourage the redemption of property, and its provisions should be liberally construed. It authorizes every mortgagee or judgment creditor to redeem, and allows such person to retain a lien upon the premises for his redemption money. It is wholly immaterial by whom the redemption is made, as the lien for the redemption money is the same, and has the same priority, by whomsoever made. This lien is retained against "any junior incumbrancer," and, as the lien is the same by whomsoever made, it must follow that it is prior to the lien of every person whose lien is junior to the lien upon which the sale was made. This court, in *Rice v. Puett*, 81 Ind. 230, in speaking of the rights of a similar redemptioner, said that by the redemption he secured a lien upon the land superior to all others, and in *Iglehart's Pleading and Practice*, p. 321, it is said that a junior incumbrancer, who redeems, occupies the same priority as to the redemption money that the original judgment creditor occupied. These statements express the law correctly. We are, therefore, of opinion that the lien for redemption money in this case is superior to the lien of appellant's mortgage.

The last position taken is that the court erred in limiting the appellant to sixty days within which to redeem said property. The bill of exceptions in this case does not show that any objection was made to either the substance or form of the decree. The recital of the clerk, following the entry

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of the decree, that objection was made and exception taken, is not sufficient to present any question concerning the decree. *Adams v. LaRose*, 75 Ind. 471.

Besides, the objection, if made, was too general to call the attention of the court to this portion of the decree. It was not equivalent to a motion to modify it in this respect.

This disposes of all the questions in the record, and, as no error appears, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment is hereby affirmed, at the appellant's costs.

No. 9890.

CARTER ET AL. v. THE FORD PLATE GLASS COMPANY ET AL.

PLEADING.—*Fraud*.—In a suit for relief against fraud, the complaint alleging actual fraud and facts amounting to constructive fraud, an answer denying the actual fraud and the facts amounting to constructive fraud, is good on demurrer.

SAME.—*Duplicity*.—Duplicity is no ground of demurrer under the code.

SAME.—*Argumentative Denial*.—There is no error in overruling a demurrer to a paragraph of answer amounting to an argumentative denial, the general denial being also pleaded.

JURY.—*Misconduct*.—*Verdict*.—*New Trial*.—After the jury had been instructed and placed in charge of a bailiff, some of them, understanding erroneously that the court had given them a short recess, separated from the rest; one drank a glass of beer, producing no intoxication; they held no conversation with any one about the case, and in four minutes all were in the jury room, where they stayed until the verdict was agreed upon.

Held, that there was no cause for a new trial.

CORPORATION.—*Stockholder*.—*When May Sue*.—*Parties*.—A stockholder in a corporation may bring suit when the corporation refuses, it being made a party defendant; in such a suit the corporation is the real beneficiary if the suit be successful.

From the Clark Circuit Court.

J. K. Marsh and *C. L. Jewett*, for appellants.

85	180
127	507
85	180
128	406
129	377
85	180
137	241
85	180
145	672
85	180
165	678

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FRANKLIN, C.—Appellants, as stockholders in the Ford Plate Glass Company, sued said company and the other appellees, alleging that the said other appellees, John Adams, John F. Read, Simon Goldback, Jonas G. Howard, Warren Horr, Edward Ford and James Burke, were stockholders and officers in the said Ford Plate Glass Company; that they conspired together with certain other persons, to wit, Patrick Heron, Abraham Fry, Felix R. Lewis and Edward Howard, to fraudulently sell and dispose of, for their benefit, all of the property of the said Ford Plate Glass Company; and, as a means for accomplishing said purpose, fraudulently organized another corporation, under the name of the Jeffersonville Plate Glass Company, and then fraudulently caused the said Ford Plate Glass Company to fraudulently convey to said Jeffersonville Plate Glass Company all of said property, for the nominal sum of \$10,000; and, for the further fraudulent purpose of procuring an additional title to said property, fraudulently caused a judgment and decree of foreclosure of a mortgage upon certain outstanding bonds to be rendered against said Ford Plate Glass Company for the sum of \$61,137; and, upon the sale of said property by the sheriff, they bid the same in, in the name of said Jeffersonville Plate Glass Company, for the sum of \$63,000; that no part of the purchase-money of either of said purchases was paid, except enough to pay the costs of the judicial sale; that, to further consummate their said fraudulent purpose, they re-mortgaged all of said property to secure the payment of \$100,000 in bonds issued by the said Jeffersonville Plate Glass Company, and disposed of said bonds; that the said Ford Plate Glass Company was in the hands of its enemies, who would not cause suit to be brought for the purpose of setting aside said fraudulent transactions. Wherefore these plaintiffs sue on behalf of themselves and all other such stockholders as may desire to join, and pray that the said sales and judgment and decree be set aside, that there be an accounting, that a receiver be appointed pending litiga-

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tion, and that said defendants be enjoined from further disposing of or in any manner intermeddling with said property.

To this complaint the defendants, the Jeffersonville Plate Glass Company, John Adams, as trustee, and John Adams and Warren Horr, as trustees, filed separate answers, each consisting of a general denial, with special paragraphs. The other defendants filed a general denial. Demurrers were filed to each of the special paragraphs. Overruled, and exceptions reserved. Replies in general denial were filed. The cause was tried by a jury, and a verdict returned for the defendants. Over a motion for a new trial, judgment was rendered for defendants.

The errors assigned in this court are upon the rulings on the demurrers and the motion for a new trial.

The bill of exceptions filed only sets forth the affidavits in support of one of the reasons for a new trial, which charged misconduct on the part of some of the jurors.

The evidence and instructions are not in the record. Appellees have not favored us with any brief, and appellants have principally discussed the sufficiency of the special paragraphs of the answer of the Jeffersonville Plate Glass Company.

The answer of the Ford Plate Glass Company is deemed unimportant, for the reason that this company was beneficially the plaintiff, and was only made a party in order to conclude it by the litigation. The only theory upon which appellants are allowed to maintain this action is, that the Ford Plate Glass Company, whose duty it was to bring and prosecute the suit, was in the hands of its enemies, and therefore could not sue. For that reason, the appellants, being stockholders of the alleged defrauded company, are allowed to sue, the company being the real beneficiary if the suit is successful. *Angell and Ames Corp.*, section 312; *Field Corp.*, section 407; *Davenport v. Dows*, 18 Wal. 626; *Dodge v. Woolsey*, 18 Howard, 331; *Bronson v. LaCrosse, etc., R. R. Co.*, 2 Wal. 283; *Bissell v. Michigan, etc., R. R. Co.*, 22 N. Y. 258; *Western R. R. Co. v. Nolan*, 48 N. Y. 513; *French v. Gifford*, 30 Iowa, 148; *Wright v. Oroville, etc., Co.*, 40 Cal. 20.

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The Jeffersonville Plate Glass Company being the most prominent defendant, and the real party in interest, we first consider its answer. The second paragraph is substantially as follows: It admits the corporate existence of the Ford Plate Glass Company; that its capital was \$150,000; that the plaintiffs were stockholders therein; that it was engaged in manufacturing plate glass, and owned certain property; and avers that at the time of the transactions complained of it owed the sum of \$62,000, on bonds and interest, and that its property was not worth over \$35,000; that it owed divers other sums, aggregating in all \$149,888.78, most of which was overdue and bearing interest; and that an outlay of \$40,000 was then necessary for machinery and repairs; and that said corporation, on the 10th day of February, 1880, was without means or credit; numerous suits were being commenced, and judgments rendered against it; that the interest on its bonds had been unpaid for three years for the want of means to pay it, and it was apparent to the officers and stockholders thereof that it could not longer carry on its business; and that unless some adjustment should be promptly effected all of its property and assets would shortly be sacrificed, and its creditors, and all other persons interested in the said company, would be subjected to great loss and damage; that at that time the secured indebtedness alone largely exceeded the total value of its property, assets and franchises; that the shares of the stockholders then were and now are of no value whatever, and are entirely worthless; that the Jeffersonville Plate Glass Company was organized for the purpose of the manufacture and sale of plate glass, and it denies that the organization was made for the fraudulent purpose charged in plaintiffs' complaint, or for any fraudulent purpose whatever, but the organization was made and effected in good faith and for lawful purposes only.

That on the 10th day of February, 1880, the board of directors of the said Ford Plate Glass Company, honestly believing and knowing that the business of the said last men-

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tioned company could not longer be carried on, and that the interest of its unsecured creditors and stockholders would be promoted thereby, in good faith sold, and caused to be conveyed unto the said Jeffersonville Plate Glass Company, all of the property, real and personal, of the said Ford Plate Glass Company; and, in consideration of such sale and conveyance, the Jeffersonville Plate Glass Company paid to the Ford Plate Glass Company the sum of \$12,000, and agreed and bound itself to pay out of the profits of its said business the interest upon all of the endorsed paper, notes and bills of exchange before that time executed by the said Ford Plate Glass Company then outstanding; then, if anything remained after such payment and the payment of the interest on the bonded debt of the said Jeffersonville Plate Glass Company, that the said last named company would pay the principal of the said endorsed paper, notes and bills, estimated at \$42,000; that the said Jeffersonville Plate Glass Company would issue to all of the creditors of the said Ford Plate Glass Company, who would accept the same, stock of the said Jeffersonville Plate Glass Company, at its par value, in payment of said indebtedness; and that, in the event of the refusal of any creditor or creditors of the said Ford Plate Glass Company to take such stock, then the said Jeffersonville Plate Glass Company would, as soon as it should become able to do so, after the payment first mentioned, pay all of said claims against said Ford Plate Glass Company in full in money; that at said time the said property, real and personal, was subject to the lien of a mortgage to Adams and Horr, trustees, amounting to \$62,000, and to other liens and judgments amounting to the further sum of \$25,000, and that the said mortgage debt was due, and the interest thereon due for three years was unpaid. The said defendant denies that the said John F. Read procured or employed an attorney to foreclose the said mortgage so executed by the said Ford Plate Glass Company to the said Adams and Horr, trustees; and it avers that said Adams and Horr, trustees as aforesaid,

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in consequence of the default of the said Ford Plate Glass Company in the payment of the interest upon the said bonds for three years, at the request of certain of the holders of the said bonds, and in pursuance of the terms and conditions of their said trust, caused the said suit to be instituted in good faith and without collusion with any person or persons, and the said John F. Read, as the president of the said Ford Plate Glass Company, for no other purpose than to save the expense of the issuing and service of process, did in good faith cause the appearance of the said Ford Plate Glass Company to be entered to said suit. No defence, legal or equitable, existed as against the trustees or bondholders in said suit, and upon the trial thereof the court found for the plaintiffs, and rendered judgment therein for the sum of \$61,737.78, with costs, and entered a decree of the foreclosure of the mortgage, and an order to sell the property, real and personal, described in the mortgage, which was afterwards duly sold by the sheriff to the Jeffersonville Plate Glass Company for the sum of \$63,000, the sale was made on the 3d day of July, 1880, and which said sum the Jeffersonville Plate Glass Company fully paid to the sheriff of said county, and to the said trustees, and to the holders of the bonds secured by the said mortgage, that sum being the highest bid therefor; that said property was not redeemed, and on the 3d day of July, 1881, said defendant received from the sheriff a deed for the same.

And this defendant, further answering, says that the said defendants, John F. Read, Simon Goldback, Jonas G. Howard, Warren Horr, Edward Ford, James Burke and the Jeffersonville Plate Glass Company did not, nor did any of them, in, by or through any of the proceedings or transactions aforesaid, secure or attempt to secure to any of the officers or shareholders of the said Ford Plate Glass Company any profit or advantage that could not or was not to be obtained and enjoyed by any and all others of the shareholders of the said Ford Plate Glass Company, upon the same terms and conditions; and it was expressly agreed and provided by the said

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Jeffersonville Plate Glass Company, that all of the shareholders of the said Ford Plate Glass Company, who desired to become interested in the said Jeffersonville Plate Glass Company, might and should do so, and that, on the request of any such shareholder or shareholders, stock to the amount of fifty per centum of the amount such shareholder held in the Ford Plate Glass Company should be issued and transferred to such shareholder by said Jeffersonville Plate Glass Company, on the condition that such shareholder should take bonds of the said Jeffersonville Plate Glass Company, at their par value, to the amount of one-half of the stock so to be issued and transferred; and the said plaintiffs, and all other shareholders of the Ford Plate Glass Company, may yet be admitted upon the same terms; that, after the said purchases by this defendant, it caused to be issued under its corporate seal 525 bonds, amounting in the aggregate to \$100,000, payable fifteen years after date, and bearing interest at the rate of eight per cent. per annum, payable semi-annually; and caused a mortgage upon all the real estate and personal property to be duly executed to secure the payment of said bonds and interest, and that, long before the commencement of this suit, all of the said bonds were sold and disposed of by the said Jeffersonville Plate Glass Company, in good faith and for valuable considerations paid to the said Jeffersonville Plate Glass Company, by the purchasers thereof, who took the said bonds in good faith and without notice of any infirmity therein; and that all of the said bonds are yet outstanding and unpaid; that, ever since said purchase, said defendant has been operating said glass works, and has expended upwards of \$20,000 for new machinery and other improvements; that it has entered into divers contracts and engagements with third persons, which engagements are yet unperformed and in full force, and, on the faith of its ownership of said property, it has contracted debts to the amount of \$150,000; and that divers persons, with no notice of any of the matters and things stated in plaintiffs' complaint, have purchased and now hold

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shares of the capital stock of the said Jeffersonville Plate Glass Company ; that the entire paid-up capital stock of the Ford Plate Glass Company is \$85,900 ; that the plaintiffs are the owners of \$9,000 of said stock, and that the owners of over \$70,000 of said stock expressly authorized and requested the officers and directors of the said Ford Plate Glass Company to make the sale aforesaid, for the reason that such sale, conveyance and transfer were necessary for the protection of the interests of the creditors of said Ford Plate Glass Company, and to prevent further loss, damage and personal liability to and of the shareholders of said company ; that all the proceedings, sales, conveyances, acts and things of which said plaintiffs have complained, were made and executed and occurred in the months of February and March, 1880, and that said plaintiffs had notice of the same ; that the said plaintiffs made no objection to the said proceedings, sales, conveyances and acts of the said Ford Plate Glass Company, its officers, directors and agents, but acquiesced in the same for the space of seven months, during all of which time the said Jeffersonville Plate Glass Company was engaged in said business, contracting new obligations and making improvements as aforesaid, on the faith of its ownership of all of said property ; that the public generally were and have been dealing in its bonds, bills, stock and credit, and the said plaintiffs, by their silence and acquiescence, caused it to be understood and believed by the defendants and each of them, that they, the said plaintiffs, sanctioned, approved and assented to and ratified all that the said defendants, and each of them, had done in the premises ; and that the plaintiffs can not now be permitted to disaffirm the said acts and proceedings without manifest injury, damage and injustice to these defendants ; and they deny all, and all manner of combination and confederacy, wherewith they are by the plaintiffs' complaint charged ; and they deny every other matter, cause or thing in the said complaint alleged, and not herein expressly admitted to be true, etc.

The third paragraph of the answer sets up its organization

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as a corporation, on the 10th day of February, 1880, the execution of the bonds and mortgage to secure their payment by the Ford Plate Glass Company, the failure to pay the interest thereon, the foreclosure of the mortgage, and the sale of the property to this defendant. The facts are all in detail specifically set forth, affirmatively alleging everything necessary to constitute a valid sale; averring that there had been no redemption of any portion of the property, and it had received a deed for the same; and denying all collusion, conspiracy or fraud in any manner whatever, and every other allegation in the complaint not herein specifically answered, etc.

The authorities referred to by appellants in their brief upon the subject of constructive fraud can not be regarded as conclusive in ruling upon a demurrer to the answers which deny the existence of fraud in fact, and the relative position of the parties, as alleged in the complaint, to constitute constructive fraud.

Had this defendant admitted in its answer the relative position to both companies of some of the defendants, as charged in the complaint, and relied solely for a defence upon the sale made by the Ford Plate Glass Company to the Jeffersonville Plate Glass Company, a question of constructive fraud might be raised. But, in ruling upon a demurrer to an answer denying these allegations of the complaint, we can not say that constructive fraud existed in the transaction. But the second paragraph goes further, and sets up a judicial sale, and denies all fraud in that transaction, and then alleges that the stockholders of about eight-ninths of the paid-up capital stock of the Ford Plate Glass Company requested said first sale and arrangement to be made; that plaintiffs acquiesced therein for more than seven months, and that in the meantime large investments had been made and liabilities incurred to innocent parties, upon the faith of the validity of the transactions complained of, and that said plaintiffs ought now to be estopped from availing themselves of the matters herein complained of.

The paragraph may be double, but that is no reason for

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sustaining a demurrer to it. If any one cause of defence is sufficiently set forth, the demurrer should be overruled. There was no motion made to divide it into separate paragraphs, nor to strike out any portion of it for not being a sufficient cause of defence.

We think this paragraph constituted a good defence to plaintiffs' cause of action; and for the same reasons we hold that the third paragraph of this answer was good.

Counsel for appellants in their brief admit that "the questions on the other answers are of slight importance;" and if they are only to be regarded as argumentative denials, there was no error in overruling the demurrers to them. And there was no error in overruling the demurrers to the second and third paragraphs of the answer of the Jeffersonville Plate Glass Company.

As the evidence is not in the record, the third reason stated in the motion for a new trial is the only one urged by appellants' counsel, and that is based upon an irregularity occurring at the trial, by some of the jurors separating from the others, after the court had charged them and they had been placed in charge of a sworn bailiff.

In support of this reason affidavits were filed on the part of the plaintiffs, and counter affidavits in explanation on the part of defendants, by which it appears that some of the jurors understood that when the court finished its charge to them it gave them a short recess, as it had frequently done before during the progress of the trial. Under this impression, two of them went down stairs to the back door of the court-house, and immediately returned; said nothing to any person, and no person said anything to them; one of the jurors went out of the court-house and went to a saloon and drank a glass of beer; while there was asked what was his hurry? He answered that he was on the jury, and had to hurry back, and immediately returned to the jury room, which was all that was said by or to him, or done by him while absent. The jurors were all in the jury room and in charge of the bailiff

Yelton *et al.* v. Slinkard *et al.*

within four minutes after the court had finished its charge to them, where they remained in charge of the bailiff until the verdict was completed.

The evidence shows that no attempt was made by any person to tamper with either of the jurors while absent, and that the one who had taken a glass of beer was not perceivably intoxicated thereby, nor in the least disqualified from discharging his duties as a juror in the case.

This was not a sufficient irregularity to require the verdict to be set aside and a new trial granted. *Pratt v. State*, 56 Ind. 179; *Barlow v. State*, 2 Blackf. 114; *Porter v. State*, 2 Ind. 435; *Stutsman v. Barringer*, 16 Ind. 363; *Creek v. State*, 24 Ind. 151. The misconduct of a juror, in order to be sufficient to justify the granting of a new trial, must be gross, and must have resulted in probable injury to the complaining party. *Harrison v. Price*, 22 Ind. 165; *Welchell v. State*, 23 Ind. 89; *Medler v. State, ex rel. Dunn*, 26 Ind. 171.

The motion having been submitted to the court upon the affidavits on both sides, and decided by the court in favor of appellees, we think the evidence sustained the decision of the court, and that there was no error in overruling the motion.

The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

No. 9698.

YELTON ET AL. v. SLINKARD ET AL.

REPLEVIN BOND.—*Verdict.* — *Value of Property.* — *Damages.* — The failure of the jury, in replevin, to assess the value of the property, as the statute requires, will not prevent the defendant from recovering its value, in a suit on the undertaking, when return is adjudged and is not made, or damages for injury to the goods while held by the plaintiff.

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SAME.—Measure of Damages.—When there is a judgment of return against the plaintiff in replevin, and he fails to return some of the goods, and returns the rest injured by bad packing and storage, the measure of damages in a suit on his undertaking is the value of the goods not returned, with six per cent. per annum from the time of replevin, and the deterioration in value of those returned resulting from the causes named, with six per cent. per annum from the date of their return.

From the Knox Circuit Court.

S. O. Pickens and *H. Burns*, for appellants.

BICKNELL, C. C.—Samuel W. Slinkard and Henry Slinkard were defendants in an action of replevin brought by Wiley Tindolph.

The sheriff took the goods under the writ of replevin and delivered them to Tindolph, who gave the usual statutory undertaking signed by the appellants. Tindolph failed to recover, and the Slinkards had judgment against him for a return of the property and for costs. Under the civil code of 1852, sections 339 and 374, the jury are required to assess the value of the property and damages for the taking or detention of it, whenever, by their verdict, there is a judgment for the return of the property; and when the property has been delivered to the plaintiff, judgment for defendant may be for a return of the property, or its value in case a return can not be had, and damages for the taking and withholding of the property. The failure of the jury to assess the value will not prevent the plaintiff, in an action on the undertaking, from recovering that value if a return can not be had. *Whitney v. Lehmer*, 26 Ind. 503; *Noble v. Epperly*, 6 Ind. 468; *Chissom v. Lamcool*, 9 Ind. 530.

Where the property has been delivered to the plaintiff, and he succeeds in the action, he is entitled to damages for any deterioration in the value of the property while in the hands of the defendant, and for expense and time lost in searching for it, *Mitchell v. Burch*, 36 Ind. 529; but not for time spent in commencing the action, *Blackwell v. Acton*, 38 Ind. 425;

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and the damages may be merely nominal. *Stevens v. McClure*, 56 Ind. 384; *Robinson v. Shatzley*, 75 Ind. 461.

And where the property is adjudged to the plaintiff and is not returned, or can not be found, he is entitled to a judgment for the value, although he did not claim the value in his complaint. *Singer Mfg. Co. v. Doxey*, 65 Ind. 65.

In the replevin suit above mentioned, there was no assessment of the value of the property or of damages for withholding it.

The Slinkards brought this action against the appellants on their undertaking aforesaid; afterwards Henry Slinkard died and his administrator was substituted for him.

The complaint assigned three breaches of the undertaking:

1. The goods were in sound merchantable condition when delivered to Tindolph, on June 23d, 1879; he had them until January, 1880; he then returned them damaged by water, dampness, exposure to bad weather, wear and tear of transportation, mould, mildew, rough usage, breakage, decay, and want of proper care and attention, and the amount of damage as to each article was particularly stated.

2. A part of the goods, particularly described, were not returned.

The third breach was struck out. A motion to strike out the first breach was overruled. A demurrer to the first breach was overruled. The defendants answered in two paragraphs:

1. The general denial.

2. That said Tindolph returned the property.

The plaintiffs replied in denial of said second paragraph. The issues were tried by a jury, who found for the plaintiffs, with \$400 damages. The defendants moved for a new trial; this motion was overruled, judgment was rendered on the verdict and the defendants appealed.

The errors assigned are:

1. Overruling the appellants' motion to strike out the first breach.

2. Overruling the demurrer to the first breach.

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3. Overruling the motion for a new trial.

The first of these assignments presents no available error. *Lawless v. Harrington*, 75 Ind. 379.

In support of the second assignment of error, the appellants claim that as the appellees had no damages assessed in the replevin suit, for the taking or detention of the property, they can recover none in a suit upon the undertaking; but in this they are mistaken. The undertaking contains three stipulations:

1. To prosecute with effect and without delay, and this stipulation is broken by a failure to prosecute with success.

Brown v. Parker, 5 Blackf. 291.

2. To return the property, if return be adjudged.

3. To pay all such sums of money as may be recovered by the defendants in the action, for any cause whatever.

In the case at bar, the first breach undertakes to state a cause of action on the second stipulation alone. It does not claim that any sums of money were recovered by defendants in the replevin suit, and that, therefore, the third stipulation has been broken. There could be no breach of that stipulation if no sums of money were recovered in the action; but there may be a breach of the second stipulation without any breach of the third.

The second stipulation is broken by a failure to return the property, if return is adjudged. Where there is a breach there are damages; and the questions are, what is a sufficient return of the property, and what is the measure of damages for a failure to return?

A return of less than all the property is not sufficient, and a return of what is nominally all the property, but is damaged, worn out and decayed by exposure to the weather and neglect and bad usage, or any act or omission of the plaintiff, is not sufficient. The statute contemplates that the property shall be returned substantially as it was when taken.

The next question is, what is the measure of damages for

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such a failure to return? If the property had been entirely destroyed, so that a return could not be had, the measure of damages would be the value of the property, at least. *Whitney v. Lehmer, supra.* Where it is only partially destroyed, so that the property is returned in a damaged condition, caused by any improper act or omission of the plaintiff, the measure of damages must be at least the difference between the value of the property so damaged and its value when taken. When the defendant in replevin has a judgment for the return of the property, but has not had damages assessed for the withholding of it, so that there can be no breach of the third stipulation of the plaintiff's undertaking, and the property is afterwards returned, but in a damaged condition, caused by the improper act or omission of the plaintiff, that is a breach of the second stipulation in the undertaking, and the defendant in an action therefor can recover the damages sustained by such deterioration. There was, therefore, no error in overruling the demurrer to the first breach of the undertaking assigned in the complaint.

As to the third assignment of error, the only reasons for a new trial alluded to in the brief of the appellants are the fifth, the first and the third which are as follows:

5th. Because of error committed by the court in giving to the jury of its own motion instruction numbered 3.

1st. Because the verdict of the jury is not sustained by sufficient evidence.

3d. Because the damages assessed by the jury are excessive. Instruction numbered three was as follows:

"The bond sued on in this action required, among other things, that Tindolph should return all the goods to these plaintiffs, if such return should be adjudged by the court. This bound the plaintiff not only to return the goods under the judgment of the court, but to return them substantially in as good condition as they were in when he received them under the writ from the sheriff. If, therefore, the jury find, from a preponderance of the evidence, that any of the half-

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high boots were delivered to Tindolph under the writ, and were not returned to these plaintiffs, pursuant to the judgment of the court, the plaintiffs will be entitled to a finding for their value when they were delivered to said Tindolph, as may be shown by the evidence, and six per cent. interest thereon from that time till the present. And if the proof shows that the goods named in the complaint as having been damaged were damaged during the period and in the manner alleged in said complaint, and returned to these plaintiffs in such damaged condition, they will be entitled to a finding for the difference, if any, shown by the evidence, in the value of the goods, resulting solely from such damage, and six per cent. interest thereon from the date of such return."

It follows, from what has been said in reference to the second assignment of error, that there was no error in the foregoing instruction.

The first and third reasons for a new trial may be considered together.

Jonas W. Slinkard testified: "I saw the goods that were replevied in Tindolph's store, in Vincennes; they were in a good condition for sale; this was about a week before they were replevied; I saw them again in January, 1880, the day after they had been returned; Thomas Bartlett, Moses and Henry Slinkard and I opened the boxes and examined the goods; the rubbers in cartons were melted and run together; this was caused by their getting warm."

Here the plaintiffs offered to prove the difference in the value of the goods at the time they were replevied and at the time they were returned to the plaintiffs; to which proof and evidence the defendants objected, for the reason, then stated to the court, that the defendants are not liable in this action for any damage except what was recovered in the replevin suit, and the court overruled said objection. The witness further said: "The boots were jammed up a little, and injured in handling; some were mouldy, and had mildew upon them; mould and mildew are caused by dampness and heat;

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the difference in value between the goods when replevied and the goods when returned was thirty-three per cent., exclusive of any fluctuation or change in the market price." On cross-examination this witness said: "All the goods had been returned except six pair of men's half-high boots; I did not fix any separate damage for mould, mildew, or rough handling, but I lumped it all together."

Thomas Bartlett testified: "I helped to open the boxes and examine the goods; we found them in rather a bad condition; some of the goods were mouldy; the boots, cloth shoes and rubber goods were wrinkled up; the mould was caused by dampness; there were shoes in the paper boxes, but they were not put in in regular order; some were crushed and in a bad fix; some of the cartons were in a bad fix—looked as if they had been wet." This witness said: "I was requested by George Lee, agent of the I. & V. railroad, to help open and examine the goods and assess damages."

Moses Slinkard testified: "In January, 1880, I and Thomas Bartlett and Jonas Slinkard opened the boxes and examined the goods; found they were all returned except six pairs of mens' half-high boots, worth, two pairs, \$5 per pair, three pairs, \$4.25 per pair, and one pair worth \$4; some of the boots and shoes were mouldy and mildewed; ladies' serge shoes were rumpled up from bad packing; rubber goods were rumpled up; the boots and shoes were mixed up; some were in paper boxes, some of which were injured by mould, and looked as if they had been in a bad place; about one-half of the paper boxes were damaged."

Charles H. Reeve testified: "I saw the goods in plaintiffs' store before they were taken on the writ of replevin; they were then in good condition; I saw them when they were brought back, in January, 1880; they were not in good condition then; some were mouldy, some of the ladies' shoes looked like they had been wet; boots were mouldy; cartons looked like they had been wet; the difference in value between the goods when taken and when returned was one-third, and

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amounted to \$481.95; when the goods were taken they were worth from \$1,200 to \$1,400; I was clerk in plaintiffs' store."

Samuel W. Slinkard testified: "When the goods were taken by the sheriff I had had them from ten to fifteen days; when taken by the sheriff the goods were worth about \$1,400; they were then in good condition and salable, except a few old goods; they were taken in June, 1879; I next saw them in January, 1880; they were returned to my store by George Lee, and I saw them the next day; Jonas and Moses Slinkard and Thomas Bartlett were present; the goods were boxed up in large wooden boxes; some were in cartons, and others were packed loose in the wooden boxes; some of the paper boxes looked like they had been wet; the rubber goods had melted and run together; looked as though they had been wet and too warm; some of the boots and shoes were mouldy and bent over; some looked pretty well, and others looked bad; mould was caused by wet and heat; the cloth shoes were mouldy, and some were rotten; some of the leather shoes were rotten; the difference in the value of the goods when returned and when taken was one-third, and amounted to \$464.05, aside from the goods that were not returned."

The bill of exceptions states that the defendants objected to the testimony of Jonas W. Slinkard, Charles H. Reeve and Samuel Slinkard, in so far as the same relates to any injury or damage to or depreciation in value of the goods described in the plaintiffs' complaint between the time the same were taken on the writ of replevin and the time when they were returned to the plaintiffs, for the reason that these defendants were not liable upon the undertaking sued on in this action for any such injury or damage, and for the reason that the measure of damages in this action is the value of the goods shown not to have been returned, and that were taken by the sheriff on the writ of replevin, and the damages awarded to the plaintiffs on the trial of the action of replevin.

This objection was rightly overruled by the court. The goods being in the possession of the plaintiff in the replevin

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suit, and packed in boxes, the defendants, when they took their judgment for a return, could not know what the condition of the property then was, nor what its condition would be when afterward returned; and they were, therefore, under no obligation to try to make any proof on that subject.

There was certainly evidence tending to support the verdict for \$400, and, if the jury believed the plaintiffs' witnesses, the damages were not excessive.

This was not a case of failure of proof, as the appellants seem to suppose.

The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

No. 9275.

VOLTZ v. RAWLES ET AL.

MARRIED WOMAN.—*Foreclosure of Husband's Mortgage. — Sheriff's Sale of Lands. — When Wife's Inchoate Interest Vests. — Obligation of Contracts. — Constitutional Law. — Statute Construed.*—Upon the foreclosure of a mortgage on real estate, executed by the husband alone prior to August 24th, 1875, to secure a debt other than for purchase-money, and the sheriff's sale of the mortgaged premises, where the judgment of foreclosure was rendered, and the sale thereunder was made, subsequent to August 24th, 1875, the wife's inchoate interest in the mortgaged real estate will not vest and become absolute in her, unless and until she shall survive her husband. In such a case, section 2508, R. S. 1881, can not be construed as applicable; for, if the section were applicable, its effect would be to impair the obligation of the mortgage contract, and, to that extent, the section would be unconstitutional and void.

From the Fountain Circuit Court.

J. B. Martin and J. W. Copner, for appellant.

L. Nebeker, for appellees.

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Howk, J.—The appellant brought this action against the appellees to obtain the partition of certain real estate in Fountain county. The appellees answered in a single paragraph, stating affirmative matters in bar of the action. The appellant demurred to the answer, upon the ground that it did not state facts sufficient to constitute a defence to her action, which demurrer was overruled by the court, and to this ruling she excepted. She declined to reply to the answer, and thereupon the court adjudged that she take nothing by her suit, and that appellees recover their costs.

The overruling of her demurrer to appellees' answer is assigned as error by the appellant. In their answer, the appellees admitted so much of the complaint as averred title in them, and that appellant was the wife of Henry Voltz; and they averred, that the appellant had no title to or interest in the premises described in the complaint, except such as she might have by virtue of her being the wife of said Henry Voltz, who was then living; that they derived title to said premises by purchase thereof at the sheriff's sale mentioned in the complaint; that the sale was made by the sheriff, pursuant to a decree of foreclosure and order of sale made by the Fountain Circuit Court, at its February term, 1876, which decree was against the said Henry Voltz for the whole of said premises, and was duly rendered by the court in favor of David Rawles, plaintiff, and against the said Henry Voltz, defendant therein; and that said decree was for the foreclosure of a mortgage, which was executed by said Henry Voltz to said David Rawles, on December 11th, 1868, to secure a debt therein described, and conveying the premises described in appellant's complaint, as a security for such debt, said Henry Voltz being at the time the owner of said premises. Wherefore, etc.

We are of the opinion that the court committed no error in overruling appellant's demurrer to appellees' answer. The facts alleged therein were sufficient to show that the appellant's inchoate title to and interest in the premises in contro-

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versy, as the wife of Henry Voltz, would not vest and become absolute in her, in such manner as to enable her to maintain an action of partition therefor, during the lifetime of her husband, and unless she survived him. In the act of March 11th, 1875 (sec. 2508, R. S. 1881), it was provided as follows: "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act, and not otherwise. When such inchoate right shall become vested under the provisions of this act, such wife shall have the right to the immediate possession thereof; and may have partition, upon agreement with the purchaser, his heirs or assigns, or upon demand, without the payment of rent, have the same set off to her."

In the case at bar, the sale of the real property of Henry Voltz was made under a judgment, rendered after the taking effect of the act of March 11th, 1875, which judgment did not direct the inchoate interest of his wife, the appellant, in such property to be sold, or barred by such sale. The appellant's case, therefore, comes within the letter of the statute. But the allegations of the appellees' answer, which were conceded to be true by the appellant's demurrer, show that the judgment, under which the sale was made, was rendered upon a mortgage executed by Henry Voltz, upon the real property in controversy, on the 11th day of December, 1868, and long prior to the taking effect of the act of March 11th, 1875. Under the law as it existed at the date of such mortgage, the appellant's inchoate interest in the mortgaged property would not vest or become absolute in her, except upon the possible

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contingency that she should survive her husband, which contingency might never happen, and, therefore, as against her, the mortgagee took the entire property by his mortgage, as a security for the mortgage debt, subject only to the possible contingency that she might survive her husband. It can not be held, therefore, that the act of March 11th, 1875, is applicable to such a case as is shown by the facts averred in appellees' answer; for, if the act were applicable to such a case, its effect would be to impair the obligation of the mortgage contract, and, that far forth, the act would be unconstitutional and void. The Constitution of the United States, the supreme law of the land, expressly declares that no State shall pass any law impairing the obligation of contracts. Section 10, R. S. 1881. It follows, therefore, that the appellant's inchoate interest in the real estate of which she seeks partition, has not vested, and will not vest and become absolute in her unless and until she shall survive her husband, Henry Voltz.

This conclusion is supported by and is in harmony with several cases recently decided by this court. *McGlothlin v. Pollard*, 81 Ind. 228; *Parkham v. Vanderenter*, 82 Ind. 544; *Baker v. McCune*, 82 Ind. 585; *Helphenstine v. Meredith*, 84 Ind. 1.

The judgment is affirmed, with costs.

No. 9909.

REAMER ET AL. v. DAVIS.

SUFFICIENCY OF EVIDENCE.—Verdict.—Master and Servant.—Consignor and Consignee.—Negligence.—A., of Cincinnati, shipped goods to New Albany, to be received and stored by B. They were received by C., upon his wharf-boat to be kept for A. until removed. The servants of B., in removing the goods from the wharf-boat, allowed part of them to fall into the river, whereby they were lost.

Held, in a suit by A. against C. for negligence, that this evidence did not support a verdict against C.

From the Floyd Circuit Court.

Reamer *et al.* v. Davis.

A. Dowling, for appellants.

J. V. Kelso, for appellee.

BLACK, C.—This was an action by the appellee against the appellants. The trial of an issue made by a general denial of the allegations of the complaint resulted in a verdict for the appellee.

A motion for a new trial was made by appellants, which was overruled. The only question presented by the motion was whether the verdict was sustained by sufficient legal evidence; and counsel have confined their argument to that question.

The complaint charged, in substance, that appellants were partners; that, on the 23d of April, 1880, they were, and they still continued to be, proprietors of a wharf-boat at New Albany, which they used and operated as a warehouse for the storage of freight shipped to and from that city by means of vessels plying on the Ohio river; that, at the date mentioned, they received on board said wharf-boat, for delivery to appellee, a large number of vehicles, among which was a barouche, the property of appellee, of the value of \$200; that appellants charged appellee a sum stated as wharfage, for receiving, storing and keeping his vehicles on said wharf-boat, which appellee paid to appellants; that they so negligently conducted themselves in storing, keeping and taking care of said barouche, that it fell off said wharf-boat into the Ohio river and was wholly lost to appellee, while in the care and possession of appellants, and without fault on the part of appellee, to his damage, etc.

The evidence showed that one Anderson was a travelling salesman in the employment of appellee. A number of vehicles, including said barouche, the property of appellee, were shipped from his house at Cincinnati to New Albany, upon the order of Anderson. They arrived on a steamboat in the evening, and were delivered to appellants on their wharf-boat, they paying the freight, which, with wharfage, was afterward paid to them by Anderson.

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Philip M. Kepley, keeper of a livery-stable at New Albany, had been authorized by Anderson to receive the vehicles from the landing, and to store them at his livery-stable. The evidence plainly showed that the barouche was lost by being suffered to go overboard by those who, the next morning, were removing the carriages from the wharf-boat, who were the servants of said Kepley, one being his adult son, assisted by one, not a servant, procured by said son, without compensation, for that purpose; that said servants, in making such removal, were acting for their master, and that such work was within the scope of their employment. The loss did not result from acts of appellants or of their servants, and it was sought to make them responsible merely because they did not prevent the acts of those who came to remove the carriages.

Anderson placed no restriction upon Kepley, with whom he had before done business of the same kind, and he may be presumed to have intended that Kepley would remove the carriages by his usual means, and, no instruction to the contrary having been given, that the carriages would be removed by Kepley's servants, whose usual occupation included such work; Kepley's personal supervision was not exacted.

The fact, that at the instance of one of the servants assistance was rendered by a volunteer, could not change the case.

A special order from the master to the servant need not always be shown to connect the master with the acts of the servants. Tacit consent or acquiescence is sufficient. A master is liable for injuries to third persons occasioned by inattention, negligence or want of skill of his servant while employed about the master's business, within the scope of the authority conferred.

A deviation of an agent, general or special, from the appropriate course, will not vitiate his act, if it be immaterial or circumstantial only, and do not in substance exceed his right. If appellants might have refused to deliver the vehicles to these persons without the production of proof of au-

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thority, they were not bound to require proof from those who, in truth, were authorized.

The evidence clearly showed that the persons who caused the loss were not unlawfully interfering with the property, but were acting under authority derived from appellee, and, therefore, that appellants were not in fault.

We are of opinion that the court should have granted a new trial.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed, at appellee's costs, and the cause is remanded for a new trial.

No. 9827.

McCRUM v. HILDEBRAND.

MARRIAGE PROMISE.—*Instruction.*—*Duress.*—In a suit for breach of a marriage promise, an instruction which correctly states the facts necessary to be proven by the plaintiff, professing to do no more, is not erroneous for failure to inform the jury further that the promise would not bind the defendant if made under duress.

SAME.—*Evidence of Contract.*—An instruction in such case, which submits to the jury the conduct of the parties towards each other, as proper evidence to be considered in determining whether a promise of marriage existed, is proper; indeed, the jury may be told that a promise may be inferred from circumstances.

SAME.—A promise of marriage, freely made, is not nullified by another made under duress.

From the Huntington Circuit Court.

J. C. Branyan, C. W. Watkins, M. L. Spencer, B. M. Cobb and G. W. Stultz, for appellant.

ELLIOTT, J.—This action was brought by the appellee against the appellant, to recover damages for the breach of a promise of marriage.

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The first instruction given by the court reads thus :

“ 1st. In order to entitle the plaintiff, Elizabeth Hildebrand, to recover in this case, it is necessary that it shall be made to appear to your satisfaction, by the preponderance of the evidence, that, at some time before the commencement of this action, the defendant, Robert C. McCrum, promised to marry her, in consideration of a like promise by the plaintiff to the defendant to marry him ; that the plaintiff thereafter either requested the defendant, within a reasonable time, and before the commencement of this action, to marry her, the plaintiff, in pursuance of such contract, and he refused to do so ; or that, by the terms of the contract, a day certain beyond the time of the commencement of this action was fixed for the performance of such marriage contract without performance, or offer of performance, of the same by the defendant, on or before the day so fixed, and that the plaintiff at all times from and after the making of such contract or contracts, up to the time of the commencement of this action, was ready and willing to marry the defendant.”

The objection made to this instruction is, to quote the language of counsel, “ That it purports to set out the only things necessary to entitle plaintiff to recover, and omits to state that if the agreement, fixing the time, was under duress, it would be fatal to the appellee’s right to sue.” There is no force in the objection. The appellee was not bound to prove, in the first instance, that the promise was not made under duress, for she was under no obligation to anticipate and disprove a matter of defence.

The fifth instruction is as follows :

“ 5th. In this case circumstantial, as well as positive proof, is competent for the purpose of making out, not only the case of the plaintiff, but any defence of the defendant, embraced within the issues as well. Hence, not only the direct statements of witnesses pro or con, that is, for or against, as to the making of any positive or actual promises, are proper to be considered, but the facts and circumstances before you in the

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proof touching the relations which existed between the parties during the period anterior to the time or times at which it is alleged the promise or contract of marriage was made, may also be weighed, as well for the purpose of determining, on the one hand, whether any such contract or promise was made, as, on the other, for the purpose of determining whether the plaintiff released the defendant therefrom, or was herself not ready or unwilling to perform the contract, if any existed. Had they then, during the period referred to, any acquaintance with each other? If so, what was the character, that of ordinary acquaintances or friends only, or of a closer or more tender and endearing character? Were the attentions of the defendant to the plaintiff, if any there were, of such character as to justify the construction that they manifested an intention on the part of the defendant to make overtures of affection and love to the plaintiff, and solicit a reciprocal manifestation thereof on the part of the plaintiff toward the defendant? Were such attentions, if any, with the knowledge of defendant, so understood by the plaintiff, and did she or not so deport herself as to be understood by the defendant as so interpreting and accepting his attentions and reciprocating his sentiments? All these and other similar enquiries fairly arising upon and growing out of the circumstances in evidence, will be properly matters entitled to be considered in determining whether a promise or contract of marriage was made, and you are not required to look only to the statements of witnesses, as to the express promises or contracts being or not being made. So, also, for the purpose of determining whether the plaintiff on her part had promised to marry the defendant, and as to whether, if there were such mutual contract, the plaintiff had released the defendant from it, or was not ready or unwilling to perform it, you may, in like manner, consider the relations, bearing, extent of social intercourse of the plaintiff with other persons of his sex other than the defendant. If, in fact, she was, during the period of the al-

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leged betrothal, receiving and accepting the attentions of another or others than the defendant as suitor or suitors, that might be a potent circumstance in determining the question whether she regarded herself at the time of receiving such attentions as being affianced to the defendant. If the relations with others, however, were only those of casual acquaintance and ordinary friendly intercourse, it will be for you, then, to consider whether such relations should militate against the claim of being under an engagement to the defendant."

The objections stated to this charge are, that "it assumes to tell the jury that the appellant would be bound if he understood that appellee was interpreting his relations with her as serious on his part, and in telling the jury that they were not required to look only to the statements of the witnesses as to express promises or contracts being or not being made."

We do not understand the instruction as making such an assumption as counsel assert, for we understand it as submitting for the consideration of the jury the conduct of the parties, and this was proper. In actions of this kind it is always proper to submit to the jury the conduct of the parties as tending to prove that the defendant had made a promise of marriage to the plaintiff.

If, however, the instruction had told the jury that the promise might have been inferred from circumstances, it would not have been erroneous. A late writer says: "From the very nature of this contract it results, that it may be proved by facts and circumstances." 2 Hilliard Con. 117. Chitty lays down a like rule, and the American editor has cited many authorities supporting and illustrating the text. 2 Chitty Con. (11 Am. ed.) 790, n.

The court did right, and this it seems almost needless to say, in directing the jury that they were not to look alone to the positive testimony of witnesses for proof of the promise to marry.

McCrum v. Hildebrand.

The eighth instruction reads thus:

“8th. If the only promise which the defendant may be shown to have made, either expressly or as being fairly deducible from the circumstances, was one induced by threats and putting in fear of serious bodily harm, he would not be bound by such promise; but though there may have been one such promise so obtained, if there were another or others voluntarily made expressly, or such other promise is fairly deducible from the facts and circumstances in evidence, and there was a mutual promise on the part of the plaintiff, then the defendant would be liable in case of refusal to perform the latter contract so by him made.”

This instruction is unobjectionable. If promises had been freely made, their effect would not be nullified by the fact that another was made under duress.

If, prior to the one which the evidence tends to show the angry father and brother obtained by threats, the appellant had, when free from restraint and fear, made other promises to the appellee, they would not be rendered nugatory by the fact that a subsequent promise was obtained by putting him under duress.

The appellant's counsel “admit,” to quote from their brief, “that there is evidence enough in the record to find that there was a promise of marriage independent of any made at the meeting of January 13th,” and this sufficiently proves the relevancy of the instruction, as the only evidence tending to show duress is confined to the day named.

We can not disturb the verdict, as there is evidence tending to show both a promise and a breach.

Judgment affirmed.

Choen v. The State.

No. 10,229.

CHOEN v. THE STATE.

CRIMINAL LAW.—*Special Prosecuting Attorney.—Judicial Cognizance.*—An indictment signed by a “special prosecuting attorney” is not subject to a motion to quash, or to a plea in abatement which does not deny the due appointment of such special prosecuting attorney—the court taking judicial cognizance of its officers and of their signatures and official designations.

SAME.—*Duties of Special Prosecuting Attorney.*—When, upon failure of the prosecuting attorney to attend, the court appoints “some person to prosecute,” the appointee may perform any duty of the office, including the signing of indictments.

SAME.—*Indictment. — Burglary.—Larceny.—Election of Counts.*—Upon an indictment of two counts, charging in one a burglary with intent to steal the goods of A., and in the other a larceny of the goods of B., the prosecuting attorney need not elect between counts, if his intention is to investigate one transaction only.

SAME.—*Word “Personal,” When Unnecessary.*—An indictment for burglary with intent to steal “goods and chattels” is not bad for the want of the word *personal* before “goods and chattels.”

SAME.—*Ownership of Goods.*—An indictment charging the larceny of specified articles, “of the value,” etc., “and the property of A.,” shows that the articles named are the property of A.

SAME.—*Practice.—Evidence.*—When the evidence shows indisputably that the conviction was had under the second count of an indictment, rulings in reference to the first count are immaterial.

PRACTICE.—*Argument of Counsel.—Bill of Exceptions.—Motion for New Trial.*—In order to save an exception to the action of the court in reference to the argument of counsel, the facts must be stated in the bill of exceptions; it is not enough that they be stated in the motion for a new trial, or in affidavits in support of that motion.

SAME.—Occurrences in the presence of the court must be stated in the bill of exceptions; but, in cases of doubt, the judge may receive affidavits or other proof to enable him to settle the bill.

SAME.—Improper speech by counsel would seem to be “misconduct of the prevailing party,” and can not be made available as an irregularity of the court unless by an exception to the court’s refusal to take proper action moved for at the time of the misconduct.

From the Cass Circuit Court.

M. Winfield and Q. A. Myers, for appellant.

D. P. Baldwin, Attorney General, for the State.

85	209
148	529
150	83
85	209
154	180
85	209
160	548
85	209
167	373
85	209
170	214

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WOODS, J.—By plea in abatement, and by motion to quash, the appellant has raised the question whether the indictment is defective, because not signed by the prosecuting attorney, but by one who signed as “special prosecuting attorney,” the record not showing affirmatively the appointment of a special prosecuting attorney.

The law provides for the appointment by the judge of the court of “some person to prosecute,” if the prosecuting attorney fails to attend, and the person so appointed may well be designated as a special prosecuting attorney. R. S. 1881, section 5865. And, by the use of the word *prosecute*, the duties of such special prosecuting attorney are not, as we think, confined to the prosecution of cases under indictments already found, but, in the absence of the regular prosecuting attorney, he may perform any duty of the office, including the signing of indictments.

The record shows that the indictment in question, signed as stated, was returned into court and filed. The statute, R. S. 1881, section 1670, requires that upon the return of an indictment the judge must examine it, and see that it is properly signed by the foreman of the jury and by the prosecuting attorney. A court takes cognizance of its own officers and of the genuineness of their official signatures and designations. *Hipes v. State*, 73 Ind. 39; *Mountjoy v. State*, 78 Ind. 172.

The court below, therefore, in passing upon the motion to quash, determined for itself whether the signature to the indictment was that of its proper officer, and, we must presume, determined properly. The plea in abatement does not deny that the special prosecuting attorney had been duly appointed; and, upon the motion to quash, we perceive no more reason why the appellant should be permitted to question the appointment, than to dispute the election and qualification of the regular prosecuting attorney, in respect to indictments signed by him in his official name. There is no error in this respect.

The first count of the indictment charges the burglarious

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entry of the appellant into the barn of John Cotterman, with intent feloniously to steal and carry away "the goods and chattels" of the said John Cotterman, then and there being, etc. The second count charges simply the larceny of "six sacks, each containing two bushels of clover seed," etc., "all of the aggregate value of fifty-four dollars, and the personal property, goods and chattels of one Harmon Cotterman."

The appellant moved to quash each count, and now insists that the first is bad because of the omission of the word *personal* before "goods and chattels"; and the second, because the ownership of the property alleged to have been stolen is not shown; it being claimed that the phrase "and the personal property," etc., of Harmon Cotterman, is not descriptive of the sacks of clover seed, but an insufficient designation of other property.

We think neither objection tenable. The phrase referred to in the second count is as clearly descriptive of the sacks of clover seed as if it read, "and being the personal property," etc. That the word *personal* is not necessary in the first count, see Moore's Crim. Law, pp. 695-6, and cases cited. "Goods and chattels" mean personal goods.

The appellant claims error in the refusal of the court to require of the prosecution an election between the counts of the indictment. If the purpose of the State was to investigate, under the two counts, only a single transaction, there was no error in the ruling. The contrary not being shown, the presumption is that such was the purpose. Indeed, it is not claimed in the brief of appellant that any effort was made to introduce evidence of more than one transaction. On the contrary, it is claimed that no evidence whatever was adduced in support of the first count; and it follows that the defendant was not harmed in this respect, or by any ruling in reference to the first count. It is not denied that there is sufficient evidence to sustain the verdict upon the second count.

Another cause alleged in the motion for a new trial is: "Irregularity in the proceedings of the court ** in permitting

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D. D. Dykeman, Esq., assisting the prosecution of the cause, over defendant's objection, to comment to the jury upon matters not in evidence, * * as set forth in the affidavits of Q. A. Myers hereto attached, marked 'A,' and made a part of this cause for a new trial."

This is not available. There is nothing in the record, except a statement contained in the affidavit referred to, to show what was said by the attorney named, or that any objection was made to it, and there is no indication whatever that any exception was taken to the alleged irregularity. It is certainly settled that no question can be made in this court upon any action of the trial court, unless an exception was duly taken and saved to such action. It is equally certain that the motion for a new trial, though itself a part of the record, does not constitute evidence of the truth of the alleged causes for the motion, and this is so, even though the motion be sworn to or accompanied by affidavits in support of it. Such affidavits can be made available only when put into a bill of exceptions, or when made a part of the record by a special order of the court to that effect. That an objection was made to anything, and an exception taken to the ruling of the court thereon, can not be shown by affidavit at all. The matters involved in an exception necessarily occur in the presence of the court, or are brought to its attention, by affidavit or otherwise, before the ruling excepted to is made, and it is by recital, over the signature of the judge, in a bill of exceptions, that the facts must be notified to this court. So, too, the argument of counsel to the jury occurs in the hearing of the court, and, if exception is to be preserved in reference to any thing said, the objectionable speech should, in like manner, be stated in the bill of exceptions. If in any case the judge is in doubt as to what was said, he may receive affidavits or hear the testimony of witnesses in order to enable him to settle the bill; but the affidavits or the testimony, so considered, can, ordinarily, cut no figure in the hearing in this court, and need not be brought into the transcript.

State, *ex rel.* Oliver *et al.*, v. Grubb, Trustee.

The propriety of this rule is well illustrated by this record, which contains affidavits and counter affidavits in reference to the speech in question, but no finding or statement of the court certifying to this court what was actually said.

It may be suggested, whether or not an improper speech of counsel ought not to be assigned in the motion for a new trial, as "misconduct of the prevailing party," rather than as an "irregularity of the court." There can certainly be no such irregularity unless the court is called upon in the proper way to take some appropriate action, and refuses or fails to do it, and an exception is duly saved. See *Morrison v. State*, 76 Ind. 335.

It is next claimed that the court erred in overruling the challenge for cause of certain jurors, who, it was shown, had served as jurors within the year last past.

There was, however, no error in this.

By the 220th section of the criminal code of 1881, R. S. 1881, section 1793, it is enacted, that "The following, and no other, shall be good causes for challenge to any person called as a juror in any criminal trial;" and in the enumeration of causes which follows, no mention is made of former service on a jury.

We find no error in the record.

Judgment affirmed.

Opinion filed at the May term, 1882.

Petition for a rehearing overruled at the November term, 1882.

No. 9756.

STATE, EX REL. OLIVER ET AL., v. GRUBB, TRUSTEE.

PUBLIC SCHOOLS.—Township Trustee.—Colored Children.—Enumeration.—Mandate.—The township trustee will not be required by mandate to establish separate schools for colored children, unless it is shown to be practicable; nor will he, unless such separate school be practicable, be required by mandate to make separate lists of such children, as provided by section 4472, R. S. 1881.

85	213
127	450
85	213
140	421

State, *ex rel.* Oliver *et al.*, v. Grubb, Trustee.

MANDATE. *Public Officer.*—A public officer will not be compelled by mandate to do an act at the instance of a relator who does not show that he has an interest in the act sought to be coerced.

SAME.—*Practice.*—The alternative writ of mandate to compel two or more acts, if not sufficient as to all, is bad on demurrer.

From the Montgomery Circuit Court.

T. E. Ballard and *M. E. Clodfelter*, for appellants.

E. C. Snyder, for appellee.

FRANKLIN, C.—This was a proceeding by mandate, on the part of appellants against appellee, to compel appellee to list the colored children in his township, of the proper ages, to attend free schools, in a separate list from that of the white children, and to organize separate schools for the education of the colored children.

An alternative writ was issued against the appellee. He appeared and filed a demurrer to the writ. Appellants then moved for a peremptory writ of mandate to issue. The court overruled appellants' motion, and sustained appellee's demurrer. Appellants refused to plead over, stood upon the rulings upon the demurrer and motion, and judgment was rendered for appellee for costs.

Appellants appealed and have assigned for error the foregoing rulings of the court.

There is but one question presented, and that is, as to whether the complaint and writ state sufficient facts to constitute a cause of action?

The complaint and writ aver that appellants are citizens, residents, taxpayers, and patrons of the public schools in Union School Township, in the county of Montgomery and State of Indiana; that said Joseph Grubb, appellee, is the school trustee thereof, in which capacity he has acted for the two years last past; that, during the time the said Grubb has been such trustee of said township, there has resided in said township a large number of colored children, giving the names of six, and averring that there are others whose names are unknown to appellants; that said colored children are

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negroes, and are of lawful and proper ages to attend the schools, being between six and twenty-one years of age respectively, and do not reside in any incorporated city or town in said township; that said colored children have not been organized into separate schools as provided by law; that no separate schools have been provided for said children by said defendant or any other officer or person, and said children are now without any separate school for colored children; that said defendant during said time has omitted, failed, neglected and refused to enumerate the said colored children in separate and distinct lists from those in which other school children are enumerated, according to law, and during said time has wholly omitted, failed, neglected and refused to organize said colored children into separate schools, having all the rights and privileges of other schools in said township, as required by law. Wherefore, etc.

To allay the general irritation in the community upon the subject of mixed schools, our Legislature has wisely provided for separate schools for the colored children. The third section of the act of May 13th, 1869, 1 R. S. 1876, p. 779, provides that "The trustee * * shall organize the colored children into separate schools, * * *Provided*, There are not a sufficient number within attending distance, the several districts may be consolidated and form one district. But if there are not a sufficient number within reasonable distance to be thus consolidated, the trustee or trustees shall provide such other means of education for said children as shall use their proportion, according to numbers, of school revenue to the best advantage."

This section was amended by the act of 1877, which amendment reads as follows:

"The trustee * * of such township * * may organize the colored children into separate schools * * *Provided*, That in case there may not be provided separate schools for the colored children, then such colored children shall be allowed to attend the public schools with white children," etc.

In the case of *Cory v. Carter*, 48 Ind. 327 (17 Am. R. 738),

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it was held that the act of 1869, providing for separate schools for the colored children, did not in any particular infringe upon the provisions of the constitution of the United States or of the State of Indiana, and that the same was constitutional and valid.

By the provisions of that act, if there were a sufficient number of colored children for a school, within attending distance, it was compulsory upon the trustee to organize them into a separate school; or, if the districts could be so consolidated as to make a sufficient number within attending distance, it was equally his duty to so consolidate them and organize them into a separate school. If neither could be done, this act made no provision for mixed schools, but left it in the discretion of the trustee to exercise his own judgment as to the manner of expending the colored children's *pro rata* share of the public school funds in their education. But the act of 1877 further provided that, if no separate schools were provided for the colored children, they should have the right to attend the schools provided for the white children; and, if any of the colored children had advanced beyond any of the grades taught in the separate schools provided for the colored children, they should be entitled to attend the schools provided for the white children, as to these higher grades. These two conditions form the only exceptions to separate schools.

It is a rule of law that, where the public good requires it, the word "may" will be construed to mean shall, and that, where the permissive form has been used, and there has been an incorrect exercise or abuse of the discretion, courts will review such exercise of discretionary powers, and compel a correct discharge of the duties imposed. *State, ex rel.*, v. Board, *etc.*, 2 Pinney (Wis.) 552; *State, ex rel.*, v. Hastings, 10 Wis. 518.

But whether the provisions of the amending act of 1877 be permissive or compulsory, there is nothing in this writ or complaint showing that there existed such a state of facts as makes it obligatory on the trustee to act, or even proper that he should act. For aught that appears, the trustee may have

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failed to act on account of the impossibility of organizing a separate school convenient for the attendance of a sufficient number of colored children to render it practicable.

The averments in the writ should show that the thing asked can be done, that its performance is not impossible, and that the relators have a clear right to the granting of the writ. High's Extraordinary Remedies, section 32; *Ackerman v. Desha County*, 27 Ark. 457.

Six or more colored children scattered all over the township, without a sufficient number to constitute a school within attending distance in any one neighborhood, would certainly not authorize the interposition of the courts to compel the organization of a separate school for their education.

To warrant a court in granting a writ of mandamus against a public officer, such a state of facts must exist as to show that the relator has a clear right to the performance of the thing demanded, and that a corresponding duty rests upon the officer to perform that particular thing. And where substantial doubt exists as to the duty whose performance it is sought to coerce, or as to the right or power of the officer to perform the duty, the relief will be withheld. So the fact that there are such difficulties in the way of performing the duty in question as to render the writ nugatory, if granted, is a sufficient objection to the exercise of the jurisdiction. High's Extraordinary Remedies, section 32; *Johnson v. Lucas*, 30 Tenn. 305; *Houston, etc., R. R. Co. v. Randolph*, 24 Tex. 317; *Williams v. Smith*, 6 Cal. 91; *People v. Forquer*, Breese, 104; *State v. Lehre*, 7 Rich. 234. "And it may be stated as a general principle, that mandamus will not lie to compel action upon the part of public officers, where it is apparent that the relator has no direct interest in the action sought to be coerced, and that no benefit can accrue to him from its performance." High's Extraordinary Remedies, section 33. *State, ex rel.*, v. *Commissioners, etc.*, 4 Kan. 261.

In the case under consideration, there is no averment that the colored children were or had been attending the schools

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organized for the white children, or any other averment showing in any manner any direct interest in appellants to have the colored children enumerated in separate lists, or separate schools organized for their education.

It is further insisted by appellants' counsel that the trustee was bound to enumerate the colored children in each district in separate lists, which he failed and refused to do; and that, although he might not be bound to organize separate schools for them, the duty of making the said enumeration was imperative, and hence, as to this matter, the writ should have been sustained and enforced.

The writ required the trustee not only to enumerate the colored children in separate lists, but also to organize them into separate schools. The trustee was required to obey the whole writ or show cause why he should not do so. He was not at liberty to execute or perform a part of the writ and disregard the other part. The writ was either good or bad as an entirety. If appellants had asked leave to amend the alternative writ, and had modified it so as only to require the enumeration, that question then might alone have been presented.

The duty of enumerating the colored children in each district in separate lists is preliminary to organizing separate schools for them, and there is no necessity for the performance of that duty until there are colored children enough in some district or neighborhood, within attending distance, to constitute a separate school, and, until that is made to appear, no harm is done by not enumerating the colored children of each district in separate lists.

Under the provisions of the second section of said act of 1869, the general enumeration of all the children in each district, without regard to race or color, designating which are colored, until the necessity for separate schools exists, and they can be practically established, is sufficient for all needful purposes. We see no wrong in not enumerating the colored children in separate lists. The law does not require an unnecessarily premature enforcement of a duty.

The Louisville, New Albany and Chicago Railway Company v. Zink.

We do not think the complaint and alternative writ contained facts sufficient to constitute a cause of action, and that there was no error in the overruling of the motion for a peremptory writ, and the sustaining of the demurrer to the alternative writ. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

No. 10,184.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. ZINK.

RAILROAD.—*Killing Stock.*—*Fencing.*—Where, in an action against a railroad company for the value of stock killed by the cars of the defendant, the evidence shows that the stock went upon the track at a place where it was unfenced, but where a fence could have been properly maintained, the company is liable.

From the Washington Circuit Court.

D. M. Alsbaugh and *J. C. Lawler*, for appellant.

S. B. Voyles and *H. Morris*, for appellee.

BICKNELL, C. C.—This suit was commenced before a justice of the peace, and was finally tried in the circuit court, where the plaintiff recovered \$156, as the value of a hog and five cattle killed by the defendant's cars, on the defendant's railway, at a place fit to be fenced but not securely fenced.

There are several errors assigned by the appellant who was defendant below, but only one of them is relied on, to wit, that the court below erred in overruling the appellant's motion for a new trial.

The reasons for a new trial were :

The Louisville, New Albany and Chicago Railway Company v. Zink.

1st. That the finding of the court was not sustained by sufficient evidence.

2d. That the damages were excessive.

3d. That the court erred in assessing the amount of recovery, the same being too large.

The damages were not excessive; some of the witnesses stated the value of the animals killed at a sum greater than the amount recovered.

The railroad company was bound to fence its road unless a competent fence was already there. *Indianapolis, etc., R. R. Co. v. Guard*, 24 Ind. 222; *New Albany, etc., R. R. Co. v. Pace*, 13 Ind. 411.

It was proved that the animals in question were killed in a "creek lot" of the plaintiff, containing four or five acres, through which lot the defendant's road passes; it was proved that the railroad was not fenced at all on the south side, and that the animals came on the track and were killed there; the appellant claims that the evidence shows a fence could not be built on the south side of the road; but upon that point there was the following testimony:

The plaintiff testified: "The hog went on to the defendant's track at a point where the road was not fenced, but could have been fenced." Again he said: "The road runs through my field where the steer was in pasture; it could have been fenced." And again: "Where the other steer and cows were killed, at the creek lot, there was no fence on the south side of the railroad track; it could have been fenced; the fence would have to be built a few feet in one place in the rocks or embankment."

William Pufahl testified: "There was no fence on the south side of the railroad at the creek lot."

William Rodman testified: "I think the railway can be fenced from the barn of plaintiff to the bluff, which is east of the barn; I think it very doubtful about building a fence at that point."

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The appellant's counsel claim in their brief, that the foregoing testimony, which was all there was as to whether the road could be fenced on the south side of the railroad in the creek lot, shows that the company was not bound to keep its road securely fenced on the south side at the place in question. But in this they are mistaken. *Ohio, etc., R. W. Co. v. Rowland*, 50 Ind. 349; *Wabash R. W. Co. v. Forshee*, 77 Ind. 158, and cases there cited.

There was evidence tending to sustain the finding of the court; the judgment, therefore, should be affirmed. *Ryan v. Beglin*, 79 Ind. 356.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

No. 10,504.

FARRELL v. THE STATE.

CRIMINAL LAW.—Practice. —Appeal.—Dismissal.—The defendant in a criminal case may, within one year after judgment, take an appeal, by the service of a written notice upon the clerk of the court in which the judgment was rendered, and upon the prosecuting attorney; but, unless the transcript be filed in the Supreme Court within ninety days after such service of notice, the appeal will be dismissed.

From the Hamilton Circuit Court.

W. Garver, for appellant.

F. T. Hord, Attorney General, and *W. A. Kittinger*, for the State.

WOODS, C. J.—The appellant was convicted upon a charge of violating the liquor law. The appellee has moved for a dismissal of the appeal, because the transcript of the record

Farrell v. The State.

was not filed in this court within ninety days from the time when the appeal was taken.

The provisions of the statute on the subject, as found in the Revision of 1881, are as follows:

“Sec. 1885. All appeals must be taken within one year after the judgment is rendered, and the transcript must be filed within ninety days after the appeal is taken.

“Sec. 1887. An appeal by the State is taken by the service of a written notice upon the clerk of the court where the judgment was rendered, stating that the appellant appeals to the Supreme Court from the judgment; and a similar notice must be served upon the defendant or his attorney; if neither can be found, then by posting up such notice three weeks in the clerk's office, in a conspicuous place. If the appeal is taken by the defendant, a similar notice must be served upon the prosecuting attorney. The parties may waive such written notice, or enter, in writing, their appearance to such appeal.”

In this case there is no waiver or entry of appearance. The judgment was rendered on the 28th day of November, 1881; the required notice was served upon the prosecuting attorney and also upon the clerk of the circuit court, that is to say, the appeal was taken, on the 3d day of May, 1882, and the transcript of the record was filed on the 8th day of November, 1882. While this was within the year allowed for the taking of an appeal, it was not within ninety days from the time when the appeal was in fact taken, and was therefore too late. For ninety days after service of the required notice the appellee is bound to take cognizance of the filing of the transcript; but, if it is not filed within that time, the appellee may presume that the appeal has been abandoned, unless within the year from the date of the judgment a new notice of appeal shall be served.

Appeal dismissed, at costs of appellant.

Smith v. Felton.

No. 9160.

SMITH v. FELTON.

85	223
143	619

PROMISSORY NOTES.—Assignment.—Collateral Security.—Endorsement.—An assignee of a promissory note who has re-assigned the note to his assignor, as collateral security, can not, while the latter so holds the note, maintain a suit on the endorsement. *Aliter*, after the debt secured is satisfied.

SAME.—Duty of Holder of Collateral Security to Sue.—One to whom a note is delivered as collateral security is not bound to sue thereon if he be certain that a suit would be fruitless.

TENDER.—To keep a tender good the money must be brought into court.

CONTRACT.—Rescission.—Pleading.—Presumption.—A general allegation in a pleading, that a contract had been rescinded, will be presumed to mean that the whole contract was annulled, and the parties reinstated in the situation occupied before the execution of the contract.

From the Montgomery Circuit Court.

E. C. Snyder, for appellant.

G. W. Paul and *J. E. Humphries*, for appellee.

ELLIOTT, J.—The first paragraph of the appellee's complaint alleges, that Simeon Krout and Mary H. Krout executed to the appellant their promissory note for \$466; that it was by him endorsed to the appellee; that the note was void as to Mary H. Krout, for the reason that she was a married woman; that Simeon Krout died insolvent, in December, 1878; that the note, after its endorsement to appellee, was transferred and endorsed back to the appellant as collateral security for the payment of three promissory notes executed by the former to the latter; that these last mentioned notes were executed for the purchase-money of real estate; that the appellant refused to convey the real estate as agreed, and, to quote from the complaint, "The defendant has accepted the possession of said real estate in full satisfaction of all the notes executed by the plaintiff to defendant, including the notes for which the note sued on was given to secure, and plaintiff to pay \$100 for damages and repairs of said premises, and plaintiff tendered the \$100 to the defendant before the bringing of this suit."

Smith v. Felton.

It is contended by the appellee, that this paragraph entitles him to recover against the appellant upon the assignment, and that it shows the latter to be liable as an assignor. The appellant insists that the contract under which the note was pledged to him as collateral security vested title in him to the note and all its incidents, and, therefore, that appellant can not maintain an action against him as an assignor.

We are satisfied that the appellee can not maintain an action upon the assignment while appellant rightfully holds the note under the endorsement and contract which placed them in his hands as collateral security. By his endorsement of the note back to the appellant, the appellee divested himself of the title, and is not in a situation to sue the maker, much less his own assignee. It can not be possible that a man may transfer a note to another, and while the note is still rightfully held by the assignee sue him upon a contract of assignment anterior in time to that made by the party who brings the action.

It is true, that the paragraph under immediate mention does, in a vague way, allege that the notes for which the one in suit was endorsed to the appellant as collateral security have been partially satisfied, but it also shows that the appellee has not performed the agreement upon which rests his right to insist upon satisfaction. By his own affirmative showing, the agreement upon which his claim to have the original debt considered satisfied is founded, has not been performed. It is plain from what is stated, that he was bound to pay \$100 before he could rightfully take from appellant the note deposited as collateral security. Where one has pledged notes as collateral security, he has no right to them without showing that he has performed the engagement which they were pledged to secure.

If the tender alleged in the complaint had been kept good by bringing the money into court, the appellee might, perhaps, have successfully asserted his right to the note which he had endorsed to appellant as a collateral security. It is an old and familiar rule, that, in order to make good a tender,

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the money must be brought into court. As the tender was not kept good, it is unavailing.

The right to have the original debt treated as satisfied depends upon whether there is a valid agreement to that effect, and performance by the appellee, for, until he becomes entitled to receive back from his creditor the note sued on, he is not in a situation to make him liable upon the contract of assignment, and, as we have seen, the paragraph under consideration does not show any right in the appellee to the note, and it is therefore bad.

The second paragraph is a peculiar one, and it is difficult to determine upon what theory it was intended to be constructed. Some of its statements indicate that the pleader's purpose was to charge the appellant as an assignor; others that the purpose was to charge him for negligence in failing to use diligence in attempting to enforce the collection of the note deposited with him as collateral security. But whatever view be taken as to the drift of the pleading, it is bad.

If it be considered as seeking to hold the appellant in the capacity of assignor it is bad, because it shows that he is in possession of the note as collateral security under an assignment from the appellee, and there is nothing showing that his right under that assignment has terminated. It is alleged that the contract of sale, on which the notes were given for which the one in suit was pledged as collateral security, was annulled by agreement and the appellant put back into possession; but it is not alleged that the debt, or any part of it, which the appellee owed the appellant was paid. It may well be that the appellant regained possession of the property and still the debt due him from the appellee remain unpaid. In order to make the paragraph sufficient, it is necessary that it should show a payment, or discharge of the debt which the note was pledged to secure, or some enforceable agreement revesting title in the appellee.

Where a plaintiff shows that he has assigned a promissory

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note to the original payee, he must, in order to make a cause of action upon the first assignment, show that it came back to him by due assignment or rightful transfer. The complaint before us shows title out of the plaintiff into the person whom he is seeking to charge as an assignor, but utterly fails to show that title was regained. For anything that appears, the title to the note in suit is still in the appellant. Having by his own assignment put title in his adversary, the appellee can not sue on the note, or its incidents, until he gets it out of him.

The paragraph, if regarded as seeking to charge the appellant for a negligent omission to enforce collection of the note, is bad, for the reason that it shows that the makers both died wholly insolvent prior to its maturity. The holder of a note deposited as collateral security is not bound to sue, when it is certain that an action would be fruitless.

The allegations of the third paragraph as to the execution and assignment of the note, as to the disability of Mary Krout, and as to the death and insolvency of Simeon Krout, are the same as those of the paragraphs already examined. It must be regarded as insufficient to entitle the appellee to recover against the appellant for a negligent failure to enforce, or to attempt to enforce, collection of the note. We have given the reason for this conclusion.

The only question, therefore, is whether the paragraph states facts sufficient to charge the appellant as an assignor. It is alleged that, after the assignment of the note to appellee, he transferred and assigned it to appellant, under a written contract, which is substantially as follows: "That John H. Smith, in consideration of the release of all claims in what is known as the Hibernia Mills, by Millard Felton, hereby agrees to assign to Felton an agreement held by him, Smith, signed by Simeon and Mary Krout, and also four notes for the sum of \$2,000, executed by them, said Felton agreeing to pay all arrearages of taxes; and the said Felton agrees to assign the above described agreement and notes to John H. Smith, to

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secure the payment of the notes hereinafter described, given for the purchase-money of a certain piece of land" (of which a description is given), "for which Millard Felton agrees to pay \$1,200, payable in instalments, and to execute his promissory notes therefor; now, the said John H. Smith agrees to release the assignment of the above described agreement and notes when the said Felton shall have paid the full amount of the first three notes, but shall hold said described premises for the payment of the remaining notes, which, if not paid at maturity, this agreement becomes null and void; and the said Felton agrees to keep the premises in repair and pay all taxes." This agreement, and also appellant's assignment to the appellee and the assignment of the latter back to the former, are dated January 25th, 1879, and are, as is evident from the terms of the contract, parts of one and the same transaction. Following the recital of the written contract are these allegations: "That, before the bringing of this suit, the plaintiff and defendant did rescind the contract for the purchase of the land which plaintiff bought of the defendant, and plaintiff did surrender possession thereof to the defendant, and did release all his claims thereto, and the defendant now has all of the said property."

It is the general rule that a contract must be rescinded in whole, and that it can not be rescinded in part, and there is in the complaint before us nothing averred which takes the case out of the general rule. It is no doubt true that parties may by agreement rescind a contract in whole or in part, and may make such terms as they please, but, where there is shown nothing more than that there was a rescission, the inference is that the whole transaction was annulled and the parties reinstated in the situation occupied before the execution of the contract. The meaning of the word rescind is, "to abrogate, annul, avoid or cancel a contract," and rescission signifies the act of annulling or cancelling. The averments of the complaint are, therefore, to be construed as charging that the entire contract was annulled or cancelled.

 Cassady v. Magher.

This is the ordinary signification of the language employed by the pleader. As the complaint upon its face shows that the entire contract was annulled, it necessarily shows that appellee's title to the note sued on was divested, because that title rested solely upon the abrogated contract. If the appellee desired to claim that the entire transaction was not annulled, it was his duty to state the terms upon which the rescission was made; for, in the absence of such a statement, the legal conclusion is that the entire transaction out of which his right to the note grew was abrogated, and that the abrogation of that contract necessarily carried away his right to the note, as that was bound up and included in the cancelled contract.

No other construction can be placed upon the complaint than that all rights conferred by the rescinded contract were annulled and the parties restored to the rights possessed by them at the time the contract was entered into. The effect of the rescission was to restore to the appellant his ownership of the note and cancel the assignment.

It is a familiar rule, illustrated by many cases in our own reports, that a plaintiff, who sues upon a promissory note, must show title in himself. In the case before us the complaint, so far from showing title in the plaintiff, shows it to be in the man he sues.

Judgment reversed, with instructions to sustain the demurrers to each and all of the paragraphs of the complaint.

85	228
128	228
85	228
143	334

 No. 9102.

CASSADY v. MAGHER.

NEGLIGENCE.—Contributory Fault.—To an action to recover for injuries sustained by the plaintiff to his property on account of the wilful, negligent and careless conduct of the defendant, an answer admitting the injuries and averring that, at the time they were committed, the defendant was intoxicated by liquor sold to him by the plaintiff, who was a licensed liquor seller, is insufficient to constitute a defence.

Cassady v. Magher.

SUPREME COURT.—*Evidence.—Instruction.—Harmless Error.*—Where the evidence clearly sustains the verdict, the judgment will not be reversed on account of an instruction not strictly correct.

From the Benton Circuit Court.

M. H. Walker, D. Smith and J. H. Phares, for appellant.

J. T. Brown and D. Frazer, for appellee.

FRANKLIN, C.—Appellee sued appellant for driving his wagon against, over and upon appellee's carriage. The complaint was in three paragraphs: 1st. For breaking and destroying the carriage. 2d. For injuring appellee's children that were then in the carriage. 3d. For frightening his wife, who witnessed the collision.

Appellant answered in two paragraphs: 1st. A denial. 2d. A special plea, admitting the injuries complained of, and alleging that, at the time they were committed, he was intoxicated; that appellee was a licensed liquor seller, and had sold him the liquors that had made him so intoxicated; that he was, therefore, guilty of contributory negligence.

A demurrer was sustained to the second paragraph of the answer, and appellant excepted. There was a trial by jury, verdict for appellee in the sum of \$33, and, over a motion for a new trial, judgment was rendered upon the verdict.

Two errors have been assigned: Sustaining the demurrer to the second paragraph of answer, and overruling the motion for a new trial.

The complaint alleged that the plaintiff was without fault; and that the injuries occurred by the wilful, negligent and careless acts of the defendant. This second paragraph was not an answer to the whole complaint; it did not profess to answer the charge of wilfulness, and was no answer to the charges of negligence and carelessness causing the injury complained of. The paragraph did not amount to anything like an answer to any part of the complaint.

There was no error in sustaining a demurrer to it.

Cassady v. Magher.

The second error assigned is the overruling of the motion for a new trial.

The evidence shows that the collision occurred on the 24th day of August, 1880, at the town of Earl Park, in Benton county, Indiana, at a point north of the crossing of two streets, on the west side of the center of the north and south street; the carriage was standing in front of the plaintiff's house, and had been standing there some ten minutes, waiting for a lady to come out and get into it; the driver, Burns, and two of plaintiff's children were in the carriage. The defendant drove his team and wagon along the east and west street, from the east, in a brisk trot, and was so driving at the time of the collision, and when he came to the crossing of the streets, he turned north to go on the north and south street towards home, and passed over the center of the north and south street toward the west side, and ran against the plaintiff's carriage, turning over both carriage and wagon. The collision occurred in the day time. The streets were sixty feet wide, and no obstruction existed to prevent a passage over any part of them. There was ample room for defendant to have safely passed without colliding with the carriage, and nothing was shown as to his horses being unmanageable. The plaintiff's children were slightly injured, and it would cost from \$15 to \$35 to repair the carriage. There was no material conflict in the evidence except as to the extent of the injuries and damages.

The only reason stated in the motion for a new trial, which is insisted upon as error, is in the court giving an instruction to the jury.

Where the evidence clearly sustains the finding of the jury, the judgment will not be reversed on account of an instruction that may not be strictly correct. Section 658, R. S. 1881; *Brooster v. State*, 15 Ind. 190; *Toler v. Keiher*, 81 Ind. 383, and authorities therein cited.

We think the evidence in this case clearly sustains the finding of the jury, and that a just result was reached in the trial of the cause.

 Hyatt v. Cochran et ux.

There is no available error in this record.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and it is in all things affirmed, with costs.

No. 9519.

HYATT v. COCHRAN ET UX.

PLEADING.—*Parties.—Practice.*—As a rule, where two or more join in an action, the complaint must show a right of action in favor of all the plaintiffs.

REAL ESTATE.—*Use and Occupation.—Husband and Wife.—Parties.—Statute Construed.*—Section 794, 2 R. S. 1876, p. 313, does not permit the joining of a wife as plaintiff in an action to enforce a right or remedy belonging solely to the husband, as for the use and occupation of his land.

SAME.—*Occupying Claimant.—Set-Off for Improvements.—Counter Set-Off for Prior Use and Occupation.—Statute of Limitations.—Statute Construed.*—Under section 1058, R. S. 1881, a recovery for the use and occupation of land can be had for no more than six years prior to the commencement of the action therefor; but if the defendant asks a set-off for the value of the improvements, the plaintiff may have a counter set-off for the use and occupation of the premises before the commencement of the six years for which there may be a direct recovery.

From the Daviess Circuit Court.

J. W. Burton and W. D. Bynum, for appellant.

G. G. Reily, W. C. Johnson and W. C. Niblack, for appellees.

WOODS, C. J.—Complaint by the appellees in two paragraphs, each showing the plaintiffs to be husband and wife, and charging the appellant with the unlawful and tortious occupation of certain lands for specified periods, and with the wrongful cutting and removal of timber therefrom.

In the first paragraph it is alleged that the lands belonged to the husband, and in the second that they belonged to the wife. The appellant insists that his demurrer to the first

85	231
134	500
85	231
150	314

Hyatt v. Cochran *et ux.*

paragraph should have been sustained, because it fails to show a right of action in favor of both plaintiffs.

The point is well taken unless the fact that the plaintiffs are shown to be husband and wife takes the case out of the ordinary rule, "that where two or more join in an action, the complaint must show a right of action in favor of both or all of them." *Lipperd v. Edwards*, 39 Ind. 165. *Maple v. Beach*, 43 Ind. 51; *Parker v. Small*, 58 Ind. 349; *Harris v. Harris*, 61 Ind. 117.

By the 794th section of the code of 1852, under which the action was brought and tried, it was provided that "Husband and wife may join in all causes of action arising from injuries to the person or character of either and both of them, or from injuries to the property of either and both of them, or arising out of any contract in favor of either and both of them."

The counsel for the appellee claim that, under this provision, the paragraph is good. While counsel for the appellant insist that the section is not applicable; that the word *and* is used conjunctively in each phrase, "of either and both of them," and must not be regarded as the equivalent of *or*, as the counsel for appellee assert; and, therefore, the paragraph is bad because it shows an injury to the property of the husband alone, and not to "the property of either and both of them," or of "one and both of them."

It is difficult to determine the meaning of this section of the code; but we are of the opinion that it was not intended to require or to permit the joining of the wife as plaintiff in an action to enforce a right or remedy belonging solely and entirely to the husband. It follows that the court erred in overruling the demurrer to the first paragraph of the complaint.

There is another question in the record which ought to be decided, because it will doubtless arise again in the case.

The 609th section of the code, R. S. 1881, section 1061, provides: "When the plaintiff, in an action of this nature, is entitled to damages for withholding or using or injuring his property, the defendant may set off the value of any permanent improvements made thereon to the extent of such dam-

Hyatt v. Cochran et ux.

ages, unless he prefers to avail himself of the law for the benefit of occupying claimants."

By the law concerning occupying claimants, section 617 of Code, R. S. 1881, section 1076, it is provided, that "the court or jury trying the cause shall assess—

"*First.* The value of all lasting improvements made, as aforesaid, on the lands in question previous to the commencement of the action for the recovery of the lands.

"*Second.* The damages, if any, which the premises may have sustained by waste or cultivation to the time of rendering judgment.

"*Third.* The fair value of the rents and profits which may have accrued, without the improvements, to the time of rendering judgment."

The defendant pleaded, by way of set-off, the value of improvements made by him upon the land, and to this the plaintiff replied by setting up as a counter set-off the value of the use and occupation by the appellant for a period anterior to the commencement of the six years next before the bringing of the action. This the court held to be a good reply, and we conclude that the ruling was right.

The right to recover for the wrongful use and occupation of land is limited to the six years next before the commencement of the action. Code, section 598, R. S. 1881, section 1058. The ordinary rule of set-off does not apply, because the action of the plaintiff is not upon contract, but for a tort, and, were it not for the statute, the wrong-doer would be entitled to nothing for his improvements. By analogy to the rule applicable to ordinary set-off, if one who has been in wrongful possession more than six years, pleads his improvements in reduction of the plaintiff's demand, the plaintiff ought to be permitted to, and we hold that he may, reply by setting up the occupation before the commencement of the six years as a counter set-off. Such, we think, was the legislative intent.

Judgment reversed, with instructions to sustain the demurrer to the first paragraph of the complaint.

Brown v. Ogg.

No. 8580.

BROWN v. OGG.

85	234
150	59

85	234
155	426

85	234
159	147

QUIETING TITLE.—*Complaint.*—A complaint to quiet title which avers title and possession in the plaintiff, and that the defendant claims title or an interest, the value of which is unknown to the plaintiff, which clouds the plaintiff's title and impairs its market value, is good on demurrer. So, also, if the character of the defendant's claim be alleged with facts showing its invalidity.

MORTGAGE.—*Real Estate.—School Fund.—Description.—Presumption.—Judicial Knowledge.*—A mortgage to the State described lands by section, township and range, not giving the county or State where situated.

Held, that it will be presumed that the lands are in this State, and from the description the court will judicially know the county.

SAME.—*University Fund.—Sale by State Auditor on Mortgage.—Notice.*—A failure by the Auditor of State to give the notice of sale which the statute, R. S. 1881, section 4610, requires, on default of a mortgagor who has borrowed university funds, renders the sale void. So, also, if he sell to make more than the amount of principal, interest, damages and costs properly due. R. S. 1881, section 4611.

SAME.—*Notice.—Publication.—Costs.*—The statute, R. S. 1881, section 4610, requires that the notice of such sale should be published in one or more newspapers, not once merely, sixty days before the sale, but continuously, during the whole of that period. *Semble*, that if the notice be published in one newspaper as required, and in another only a part of the time, the notice is sufficient; but in that case the expense of the notice in the latter paper is no part of the proper costs, and if it be included in the sum for which the land is sold, the sale will be void.

From the Hancock Circuit Court.

J. L. Mason and J. H. Mellett, for appellant.

J. M. Morris, A. L. Ogg, H. W. Harrington and A. B. Young, for appellee.

MORRIS, C.—The appellee sued the appellant and one James L. Mason for the purpose of quieting his title to certain real estate situate in Hancock county, Indiana. The complaint is in two paragraphs.

The first paragraph states that the appellee is the owner in fee of said real estate, and in the possession of the same; that the appellant and said Mason claim title to or an interest

Brown v. Ogg.

in said real estate, but that he is ignorant as to the precise nature of said claims, and can not, therefore, more particularly describe the same; that said claims cast a cloud upon his title and diminish the market value of his land. Prayer that his title may be quieted, etc.

The second paragraph describes the land and avers title in the appellee. It further states, that on the 22d day of April, 1878, the Auditor of State of the State of Indiana offered said real estate for sale at the door of the court-house, in the city of Indianapolis, under and in virtue of a pretended mortgage theretofore executed by one Lewis Sebastian, Jr., and his wife Ellen E., conveying to the State of Indiana, said land to secure the payment of a note for \$500, money borrowed from the university fund of said State, and no one bidding the amount of principal, interest, damages and costs claimed by said auditor to be due on said pretended mortgage, said auditor bid in said land for the use of said fund, and thereupon immediately re-offered and sold the same to the said James L. Mason, on a credit of five years; that said Mason, as the appellee is informed and believes, without consideration, transferred to the appellant, Brown, all his title to said land acquired by the sale thereof to him by said auditor; that James D. Williams, then Governor of the State, executed and delivered to the appellant a deed for said land; that said deed and claim of said Brown thereunder cast a cloud upon the appellee's title to said land.

It is averred that the purchase of said land by the Auditor of State, and his sale of the same to said Mason, were void for the following reasons:

1. Because the description of said real estate, in said pretended mortgage executed by said Sebastian to the State, is uncertain and insufficient, for the reason that it does not state the county or State in which the land is situate.

2. Because the auditor sold said real estate for \$6 more than the principal, interest, damages and costs due on said pretended mortgage.

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3. Because said auditor failed and refused to offer said real estate for sale in parcels, it being susceptible of division without damage, and was worth \$4,000.

4. Because the auditor failed to give sufficient notice of such sale.

5. Because it was not mentioned in the notice at which door of the court-house the sale would be made, there being several doors to the court-house fronting on different streets.

Mason disclaimed having any interest in the suit, and the appellant demurred separately to each paragraph of the complaint. The demurrer was overruled.

The appellant answered the complaint by a general denial.

The cause was submitted to the court for trial; finding for the appellee; the appellant moved for a new trial; the motion was overruled, and a decree rendered quieting the appellee's title to the land in controversy.

• The rulings of the court upon the demurrer and upon the motion for a new trial, are assigned as errors.

There was no error in overruling the demurrer to the first paragraph of the complaint. The demurrer admits that the appellee is the owner in fee of the land in controversy, and that the claims of the defendants below cast a cloud upon his title. These facts entitle the appellee to the relief asked.

Nor do we think the court erred in overruling the demurrer to the second paragraph. We do not think the sale void because the land was not sufficiently described in the mortgage upon which the sale was made. It is alleged that it was not stated in the mortgage in what county or State the land mortgaged was situated. The mortgage was executed by parties residing in Indiana, for the purpose of securing the note of the mortgagor to the State for \$500, borrowed by him of the university fund. Upon these facts it will be presumed that the land mortgaged was situate in this State. *Dutch v. Boyd*, 81 Ind. 146.

It is obvious that the land, if in this State, must be in Han-

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cock county. The east half of the southwest quarter of section three, in township 15 north, of range seven east, the land in dispute, can not be, if located in Indiana, in any other county than Hancock. It follows that the complaint fails to show that the sale is void because the mortgage did not sufficiently describe the land mortgaged. But it is alleged that the auditor failed to give the notice of the time and place of sale as required by law, and that he sold the land for \$6 more than it was liable for. This the demurrer admits. The auditor could not sell without substantially pursuing the statute. The statute required him to give sixty days notice of the time and place of sale. *Arnold v. Gaff*, 58 Ind. 543, and cases there cited. If, as is alleged, the auditor sold the land for more than was due upon it, the sale was void. The auditor is authorized to make sale of only so much of the mortgaged premises as will satisfy the amount of principal, interest, damages and costs due. 1 R. S. 1876, p. 947, section 44.

We think there was no error in overruling the demurrer to the complaint.

The appellant insists that the court erred in overruling his motion for a new trial.

The appellee proved a title in himself to the land in controversy, regularly derived from the United States. His title must prevail unless divested by the sale of the land made by the Auditor of State upon a mortgage executed by a former owner.

The testimony introduced by the appellant shows that the land was offered for sale by the Auditor of State, at public auction and at the door of the court-house, in Indianapolis, on the 22d day of April, 1878, for the non-payment of the principal and interest due on said mortgage to the university fund; that, no cash bid having been made for the land, the auditor bid it off for the benefit of said fund, and immediately re-offered and sold the same for the amount claimed by him to be due, to said Mason on a credit of five years; that Mason subsequently assigned and transferred his certificate of purchase to the appellant.

It was also proved that the Auditor of State had given notice of the time and place of said sale by publication thereof in the Indianapolis Weekly Sentinel for nine consecutive weeks, and in the Indianapolis Weekly Journal, in like manner, for eight weeks. Six dollars was charged for each publication, and the land was sold for the payment of the sums so charged, as well as for the principal, interest, damages and other costs for which it was liable.

The appellee insists that the notice thus published was insufficient, for the reason that it was not published continuously in the Weekly Journal for sixty days as required by the statute. He further insists that if it should be held that it was sufficient to publish the notice for sixty days continuously in the Weekly Sentinel, the sale must still be held to be void, for the reason that it was made for the payment of the costs of the insufficient publication in the Weekly Journal.

The appellant, on the other hand, contends that the statute requires but one publication of the notice to be made; that, if the notice was published once, sixty days immediately before the sale, it was sufficient; that the notice having been published on the 20th of February, 1878, in both the Sentinel and Journal, it was, therefore, published for a sufficient length of time in each. He further contends that if the notice was properly published for sixty days in the Sentinel it was sufficient, and the auditor was at liberty to publish it in the Journal or other paper for any period less than sixty days which he might think proper and necessary, and charge the expense to the mortgaged property.

The statute upon the subject is as follows:

“On failure to pay any interest or principal when due on any such mortgage, the auditor shall advertise the mortgaged property for sale in one or more of the newspapers printed in this State, for sixty days.” 1 R. S. 1876, p. 947, section 43.

We think that a fair construction of this statute requires the Auditor of State to continue the notice in the paper in

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which it is published for sixty days; that the notice must appear in every issue of the paper during such period. The language of the statute is that the notice shall be published "for," that is, during "sixty days." One insertion, though made sixty days before the sale, would not satisfy the language of the statute. The phraseology of this section differs from the statutes construed by the cases referred to in the appellant's brief. *Denning v. Smith*, 3 Johns. Ch. 332; *Wade on Notice*, section 1113.

The proof shows that the notice was inserted in eight issues in the *Weekly State Journal*, the first on the 20th of February, 1878, the last on the 10th of April, 1878. The sale took place on the 22d of April, 1878. The notice was, therefore, only published in the *Weekly Journal* for forty-nine instead of sixty days and was, we think, insufficient and unauthorized. We do not think that the auditor had the right to publish the notice for less than sixty days in the *Journal* and charge the cost upon the mortgaged property, because he had published the notice for the proper period in the *Weekly Sentinel*. The statute plainly requires that publication of the notice be made for sixty days. The auditor has no authority, therefore, to publish it for a less period.

It may be that the notice published in the *Sentinel* should be held to be sufficient. Assuming this, still the auditor had no right to sell the land mortgaged to pay the cost of the insufficient publication in the *Journal*. This he did, and it must be held to render the sale void. *Arnold v. Gaff, supra*. We think the judgment below should be affirmed. We do not wish to intimate that the appellant is without remedy. He will, in case he should have to pay anything to the State, be remitted to its rights as against the land.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the appellant's costs.

 Keiser *et al.* v. Lovett.

No. 9645.

KEISER ET AL. v. LOVETT.

NUISANCE.—Horse Stable.—A stable is not a nuisance *per se*, and a court of equity will not, at the instance of an adjoining lot-owner, whose residence and well are twenty-five or thirty feet distant from defendant's wood and carriage house, erected upon his own premises, enjoin him from constructing a horse stable therein, where the stable may never be used, and where its use may not injuriously affect such person, his family or his property.

SAME.—Complaint.—A complaint, in an action to enjoin the erection of a horse stable upon an alley by an abutting property-owner, alleging the obstruction of the alley by such building, and in such proximity to the plaintiff's residence that, if used for such purpose, it will endanger the health of himself and family, and render his property useless as a residence, is sufficient on demurrer.

From the Madison Circuit Court.

J. W. Sansberry, M. A. Chipman and J. W. Sansberry, Jr.,
for appellants.

M. S. Robinson and J. W. Lovett, for appellee.

BEST, C.—This action was brought to enjoin the appellants from erecting a stable near the residence of the appellee.

The parties own adjoining lots in the city of Anderson, fifty feet in width, between which there is a graded and gravelled way eight feet wide, in which each has an easement, and which is used by them in common as the only way from the street on the front to the rear of their respective lots. The complaint avers that the appellants are obstructing this way by erecting a stable thereon so near the appellee's residence that if used for such purpose, as threatened, it will diminish the value of his property, endanger the health of himself and family, and will render his property useless as a residence.

A demurrer to the complaint was overruled; an answer filed; a trial had; a finding made for the appellee; and, over motions for a new trial and in arrest, final judgment was rendered upon the finding, perpetually enjoining the appellants

85	240
138	51

85	240
144	124

85	240
148	418

Keiser et al. v. Lovett.

from erecting and using such building for a stable, but not from erecting it and using it for any other purpose.

The demurrer to the complaint and the motion in arrest of judgment present the same question, and that is, whether the complaint states facts sufficient to constitute a cause of action.

Without setting out the complaint more fully, we will say that the averments as to the threatened use of the stable, coupled with the averments as to the obstruction of the graded and gravelled way, were sufficient, in our opinion, to constitute a cause of action, and that the demurrer and the motion in arrest of judgment were properly overruled.

The motion for a new trial embraced many reasons, and, among others, it was insisted that the finding was not sustained by sufficient evidence, and was contrary to law. These reasons were, in our opinion, well assigned, and the others will not be noticed.

The material facts are undisputed. The appellee owned and resided with his family upon a lot 50 feet wide by 216 deep, fronting north on a public street, in the city of Anderson. The appellants owned and resided upon the adjoining lot upon the west. This lot was 50 feet wide and 108 feet long. Between these lots, and occupying a strip four feet wide off each of them, there was a graded and gravelled way eight feet wide, extending from the street in front to the street in rear of the appellee's lot. This way was closed by a gate at each street, and by one at the rear of appellants' lot. The appellants had procured the material, employed a carpenter, and had raised the frame of a building at the southeast corner of their lot, on a line with the west side of the graded way, 15 feet in width, east and west, by 30 feet in length, north and south. This frame was 16 feet high, was to be covered with a shingle roof of the ordinary pitch, enclosed and divided as follows: A room 14 feet in width off the north end was to be used for a wood-house and store room; the next 8 feet was to be finished for a buggy shed, and the residue for a horse stall.

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The place where the stall was to be constructed was, according to the appellee's testimony, 25 or 26 feet from his well, and 28 or 29 feet from the corner of his house. According to the testimony of others, it was nearly twice this distance. The appellants did not own a horse, nor did they have one. No threats were made about the manner of keeping one. Nothing at all was said about keeping a horse except by the appellant Samuel. When he directed the carpenter to fix the stall, he said to him, that if he ever got a horse he would use the stall, and he said to a neighbor, who enquired of him what he intended to build, that "he was going to put up a woodshed, a buggy-shed, and a place to keep a horse when he wanted to keep one." There was some testimony tending to show in what manner the appellee's property would be affected if a stable should be kept, as stables are usually kept, where this frame was erected; but as there was no evidence whatever that the appellants threatened to keep such stable, or contemplated any such thing, these opinions were mere conjectures, based upon an assumed state of facts that had no foundation whatever in the evidence, and, therefore, can not possibly support the finding. The facts are, that appellants intended to construct a stall for a horse in a building they proposed to erect within the distance averred from appellee's residence. The mere construction of the stall is not a nuisance, and appellants can not be enjoined from building it. Its character depends upon the manner in which it shall be used. The manner of its use is now wholly problematical. Indeed, its use at all depends upon a contingency that may never arise; and, if it ever arises, the stall may be so finished and so used that its use may in no manner affect injuriously the appellee, his family or his property. A stable is not a nuisance *per se*. *Curtis v. Winslow*, 38 Vt. 690; *Burditt v. Swenson*, 17 Texas, 489; *Shiras v. Olinger*, 50 Iowa, 571 (32 Am. R. 138).

Whether it is or not, depends upon the mode of its construction, its proximity to residences, and the manner in which

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it is used. *Aldrich v. Howard*, 7 R. I. 87 ; *Kirkman v. Handy*, 11 Humph. 406 ; *Flint v. Russell*, 5 Dillon C. C. 151.

An injunction will not be granted where the apprehended injury is merely contingent. *Cleveland v. Citizens, etc., Co.*, 20 N. J. Eq. 201 ; *Rhodes v. Dunbar*, 57 Pa. St. 274 ; *Wood Nuisances*, section 789.

This is especially true where the anticipated injury arises from the use to which the property is to be put, and not from the nature of the structure itself. *Duncan v. Hayes*, 22 N. J. Eq. 25 ; *Flint v. Russell*, 5 Dillon C. C. 151. •

Courts of equity will not, in advance, enjoin the erection and use of a building when the use of it may not prove essentially injurious to others. *Loring v. Small*, 50 Iowa, 271 (32 Am. R. 136) ; *Curtis v. Winslow*, 38 Vt. 690.

In this case there was no evidence that the building obstructed the graded and gravelled way. There was some dispute whether the frame, when first erected and when the suit was commenced, did not extend a few inches over the west line of the graded and gravelled way ; but the frame was at once moved and placed entirely upon the appellants' premises, so that at the trial there was no claim that it in any manner obstructed the way. The right to recover depended entirely upon the fact whether the stall, when constructed and used, would constitute a nuisance, and this, as we have shown, was contingent and uncertain. Under such circumstances an injunction will not be granted. The evidence was insufficient, and the motion for a new trial should have been sustained. For this error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instructions to grant a new trial.

The Lebanon and Royalton Gravel Road Company v. Adair.

No. 9666.

THE LEBANON AND ROYALTON GRAVEL ROAD COMPANY
v. ADAIR.

PROMISSORY NOTE.—*Gravel Road Corporation.—Contracts with Officers.*—A turnpike company is authorized by statute, R. S. 1881, section 3653, to borrow money of any officer thereof for use in making its road, and to execute a promissory note therefor.

- SAME.—*Officer de Facto.*—After the lawful election of other directors, and their organization as a board, a note made by the old board (still acting as such, but as usurpers) to its president, and signed by him as such, with the other officers, is unauthorized, and is not the note of the corporation.

From the Boone Circuit Court.

C. S. Wesner and J. S. Busby, for appellant.

F. M. Charlton and W. W. Spencer, for appellee.

ELLIOTT, J.—The appellant contends that a promissory note executed by a gravel road company to one of its officers for money borrowed of him is invalid, for the reason that an officer can not contract with the corporation. In our opinion the statute governing gravel road corporations authorizes an officer to lend money to the corporation and receive from it a note for the money lent. The statutory provision to which we refer is as follows: "Whenever any director or other officer of any * * gravel road company heretofore organized under the laws of this State shall have become a creditor of any such corporation, for money loaned to the same and actually used in the original construction of such road, such director or other officer shall stand on equal terms with any other creditor in any and all suits for the collection of his debt." This is a general provision extending to all gravel road companies incorporated under our general statutes, and is intended, as its language clearly implies, to authorize corporate officers to aid in building roads by making loans to the corporation for that purpose. This statute so plainly authorizes an officer to make with his corporation such a contract as that declared on, that we need not enquire what would be the effect of such

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a contract in the absence of any statutory provision, but, as having a direct bearing upon the question, refer to *Bristol, etc., Co. v. Probasco*, 64 Ind. 406.

A corporation may execute to its creditor any of the ordinary evidences of indebtedness, as a promissory note, bond or the like, unless there is something in the statute to the contrary. In the present case no provision of the statute prohibiting the execution of promissory notes has been pointed out, nor have we in our own search been able to find any such provision.

A duly verified answer denied the execution of the note declared on, and a material question upon the trial was whether the execution of the note had been proved. That question is presented to us by this appeal, and our examination of the evidence leads us to the conclusion that it must receive an answer favorable to the appellant. The note is dated the 4th day of October, 1879, is payable six months after date, is signed by the appellee as president of the corporation, and by several others respectively, as secretary, treasurer, and directors; it was given in the place of one executed on the day on which that in suit bears date; this note, that sued on, was not executed until after April 10th, 1880, and was then executed because the one first written was not so signed as to constitute it the note of the corporation. As the note sued on was intended to take the place of the first one, it was dated as of the day that one was executed, but there was no difference in the form or substance of the two notes except as to the manner of signing. On the 10th of April, 1880, an election was held which resulted in turning out all of the old officers by whom the first note was signed and in supplying their places with different persons. The old officers testified that they continued to manage the affairs of the corporation for several days after the election, but there is uncontradicted testimony that the new board organized immediately after the election on the 10th of April. It thus appears that the new board of directors had entered upon its duties on that day,

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and this terminated the power of the defeated officers to execute a note to one of their associates. We need not enquire what the rule would be if the note had been executed to a third person, for here the person to whom it was executed was one of those who had been voted out of office, and who knew that neither he, nor his associates, had authority to bind the corporation.

The sworn answer put the appellee upon proof of the execution of the note, and this burden imposed upon him the necessity of proving that those who assumed to act for the corporation possessed competent authority to execute the note in suit. It was not sufficient for him to show that those whose names were annexed to the note assumed to act as officers; he was bound to show that they did possess the official character assumed by them.

It is true that the defeated officers did continue to manage the affairs of the corporation, but it does not appear that they were authorized to do this. The fact that they did transact corporate business after their official terms had expired did not authorize them to execute a note to one of their own number. If it had been shown that what they did subsequent to the election of their successors was authorized, then there might, perhaps, be some plausibility in the claim that the note upon which the recovery was had is that of the corporation; but, for anything that appears, they were mere usurpers, wrongfully conducting business after they had been put out of office and their successors had effected an organization and assumed their official duties.

The appellee insists that the persons who signed the note in suit were officers *de facto*, and that their acts were, for that reason, binding upon the corporation. If the note had been given to a stranger there would be much force in this argument, but the rule which applies where a third person is suing is very different from that which applies where the person suing is himself the one who claims to be a *de facto* officer of the corporation. In this case the appellee claims to recover

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upon a note executed to himself, and signed by him as the principal officer of the corporation, and it would be a perversion of the doctrine upon the subject of *de facto* officers to allow him to use it as a shield. The law upon this point is concisely and accurately stated in a note to *Hildreth v. McIntire*, 19 Am. Dec. 61, where it is said: "As hereinbefore stated, from considerations of public policy, the acts of *de facto* officers are valid and binding as to the public and third persons, yet as to himself, they are invalid, and afford him no protection whatever." In support of the proposition, a great number of cases are cited, to which may be added *Conway v. City of St. Louis*, 9 Mo. App. 488, where it was held that the rule holding valid the acts of officers *de facto* does not apply to the case of one who contracts with full knowledge that the agency and authority of the person who assumed to act as the agent of the corporation had terminated.

The record affirmatively shows that the judgment rests upon the note described in the complaint, and it therefore appears that it is without legal foundation, for the note is not that of the appellant.

We decide no other question, on this branch of the case, than that the note sued on is not that of the gravel road company, and that the judgment is consequently without any legal support.

Judgment reversed.

No. 9492.

BUNTIN v. PRITCHETT, ADMINISTRATOR.

CONVERSION.—*Promissory Note.*—*Complaint.*—*Demand.*—*Parol Trust.*—*Deed.*—*Exhibit.*—A mother contracted with a stranger for the sale of land at an agreed price. This contract she gave by delivery to her three sons, A., B. and C., and at the same time conveyed the land to A. in trust, to be conveyed to the purchaser, which was done, and a note taken in A.'s name (but really for the three) for a part of the purchase-money. B. sold

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his interest in the note, without endorsement, to C., while A. yet had possession of it. A. then transferred the note to D., who knew the facts, and who collected it and used the money. Suit by C. against A. and D. to recover for the conversion.

Held, that no demand need be averred; that A. held the note upon a trust which was valid though not in writing, and that the complaint of C., alleging the foregoing facts, was good on demurrer.

Held, also, that the deed was not a necessary part of the complaint.

Held, also, that, upon the facts stated, the plaintiff could recover two-thirds of the money collected by the defendant D., with six per cent. per annum until the trial.

SAME.—Variance.—Amendment.—In a suit for the conversion of a note, a variance as to the date and amount of the note may be amended at the trial.

From the Knox Circuit Court.

G. G. Reily, W. C. Johnson, W. C. Niblack, F. W. Viehe
and *R. G. Evans*, for appellant.

O. F. Baker, for appellee.

FRANKLIN, C.—Robert B. Whittlesey, appellee's intestate, sued Francis V. Whittlesey, Henry S. Whittlesey and Touissant C. Buntin, for the conversion of two-thirds of a promissory note for \$1,000. A demurrer was overruled to the complaint. Trial by jury, and a verdict for the plaintiff against Buntin for \$752; and, over a motion for new trial, judgment was rendered upon the verdict.

The errors complained of are the overruling of the demurrer to the complaint, and the overruling of the motion for a new trial.

The complaint is long and need not be copied; it substantially avers that on the 1st day of January, 1875, one Elizabeth Whittlesey was the owner of a chose in action, in the form of a written contract between one Joseph A. Dougherty and herself, by the terms of which Dougherty was to pay to her, or her assigns, \$3,000, for which she, or her assigns, was to convey to him certain described real estate; that said Elizabeth, as a gift, assigned by parol this chose in action to her three sons, Robert B., the plaintiff herein, Francis V. and Henry S., two of the defendants herein, and, with the

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consent of all, delivered it to Francis for their joint use ; she also contemporaneously deeded the real estate to said Francis in trust to enable her said assignees to have the land conveyed to Dougherty upon the maturity of the contract ; afterwards her assignees, through Francis, conveyed to Dougherty and received upon the contract from Dougherty, among other things, a note for \$1,000, payable upon its face to Francis, but in fact the joint property of said Robert, Francis and Henry ; the other two \$1,000 payments had previously been received by said Francis, and the money divided between the three as provided for in the gift from Elizabeth ; Henry then, for a valuable consideration, sold and assigned, without endorsement, his one-third interest in said note to the plaintiff. Appellant, Buntin, afterwards, with a full knowledge of all the facts, procured said note by said Francis to be transferred to him, collected the money, and converted the full amount thereof to his own use. He collected the money upon a judgment rendered in his favor in the Knox Circuit Court, December 21st, 1878. This suit was commenced May 21st, 1880.

The objection to this complaint is that it is an effort, by parol, to engraft a trust upon a deed for real estate, without the deed's having any reference to the trust, and without the deed being made a part of the complaint.

We do not think the complaint shows an effort to establish a trust in lands by parol, which is prohibited by our statute concerning trusts and powers. 1 R. S. 1876, p. 915.

This statute does not prohibit the creation of trusts in personalty, by parol ; that power still exists. This complaint does not seek to follow the land, fasten a trust upon it, or in any manner interfere with the land ; it only seeks to recover for the conversion of a promissory note, which had, by express agreement, been placed in the hands of defendant Francis V. for the use in part of the plaintiff, alleging that the defendant Francis V. had converted the note to his own use by transferring it to defendant Buntin ; that Buntin had collected and

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appropriated the proceeds thereof to his own use; and that defendant Henry had transferred without endorsement his interest in the note to the plaintiff. It was not necessary to make the deed a part of the complaint; it placed the title in Francis in trust for Dougherty, in order to fully enable Francis to carry out the arrangement of the donor in dividing the proceeds of the land among those to whom the chose in action had been given.

The complaint expressly charged a conversion of the note, and it was not necessary to allege a demand for the money. *Bunger v. Roddy*, 70 Ind. 26, and authorities therein cited.

We think the complaint states facts sufficient to constitute a good cause of action, and there was no error in overruling the demurrer to it.

The next error assigned calls in question the ruling of the court below upon appellant's motion for a new trial.

Under this error it is insisted that the evidence does not support the verdict, for the reason that it does not prove that there was any conversion of the note, or any demand made for the money. Where a conversion is charged, a demand need not be averred, and, if the conversion is proven, no demand before bringing suit need be proven.

The question then arises, does the evidence prove a conversion? The transfer of the entire note by Francis V. to Buntin, he having a full knowledge of all the facts, was a conversion of plaintiff's interest therein, and rendered them liable to the plaintiff for the value of his said interest.

The defendant Henry was made a party to answer as to his interest, and was defaulted. The plaintiff, Robert B., departed this life after the judgment was rendered and before the motion for a new trial was filed, and appellee, Pritchett, was appointed as his administrator, and substituted as plaintiff in the case. Buntin was the uncle of the three brothers, and the evidence shows that he was conversant with all the facts. The judgment is against him alone, and he appeals to this court.

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We think the evidence supports the verdict of the jury, and that the verdict is not contrary to law.

It is also insisted as a reason for a new trial, that the damages assessed are excessive.

Appellant collected the judgment against Dougherty, rendered December 21st, 1878, for \$998.30.

Two-thirds of which was \$665.53

Interest on that, at six per cent., to Decem-

ber 3d, 1880, time of the trial of this case, 77.81

Making amount due plaintiff \$743.34

Amount of verdict 752.00

The plaintiff remitted 11.00

And the judgment stood for \$741.34

We do not see wherein this is excessive; the evidence does not show that appellant was entitled to any credits.

Appellant, in the conclusion of his brief, presents as an objection to the sufficiency of the evidence, that the note transferred to Buntin was for only \$925, instead of \$1,000, and was dated April 24th, 1876, instead of March 25th, 1875. That is true of the note on which Buntin took his judgment against Dougherty. But the evidence shows that the parties changed the note after the death of the donor, and Francis took a new note for a less sum by \$75 than the old one. How this difference was arranged is not shown by the evidence. And that Buntin took his judgment upon the new note and not the old one. The judgment was for a less sum than the old note would have amounted to. If a variance, it was one that might have been cured by amendment. It worked appellant no injury, and does not furnish him with any good reason for complaint. There was no error in overruling the motion for a new trial.

We think the case was fairly tried and a just result reached.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing

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opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Opinion filed at the May term, 1882.

Petition for a rehearing overruled at the November term, 1882.

No. 9702.

SQUIRES ET AL. v. SUMMERS ET AL.

DEED.—*Delivery.*—*Escrow.*—*Depositary.*—*Agreement.*—A deed, made in consideration of natural love and an agreement for support, to two sons and the wife of another son, was, after signing and being acknowledged, handed by the grantor to the husband of the female grantee, with the direction, "Take it and give it to some one to keep while I live, then to be recorded." It was accordingly given to the grantor's wife, and by her kept until the grantor's death, and then was recorded, though the grantor had, a few days after the transaction, said it had not been delivered.

Held, a good delivery of the deed.

From the Martin Circuit Court.

W. R. Gardiner, S. H. Taylor, T. M. Clark and E. Moser, for appellants.

J. T. Rogers and ——— *Shirey*, for appellees.

BICKNELL, C. C.—This was an action for partition by the appellants against the appellees, who claimed that one of the tracts in controversy belonged to them exclusively, under a conveyance from the common ancestor.

The cause was tried by the court, who stated in writing a special finding of the facts and the conclusions of law thereon.

The conclusions of law were, that the appellants were entitled to partition of one of the tracts only, and that the appellees owned the other exclusively; the court also found that the land owned jointly by all the parties ought to be sold, and appointed a commissioner therefor.

The record states that the plaintiffs objected and excepted

85 252
146 384

85 252
155 359

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to the conclusions of law and to the judgment of the court therein, and prayed an appeal. There was nothing to appeal from except the order of sale. 2 R. S. 1876, pp. 245-6, secs. 576, 577; *Kern v. Maginniss*, 41 Ind. 398; *Hunter v. Miller*, 17 Ind. 88. There is no brief for the appellee. The appellant, in his brief, says the only question is, whether the deed relied on by the appellees was delivered to the grantees therein named. The facts were found to be as follows:

The deed was a warranty deed in the statutory form. The grantees were two sons of the grantor, Richard Summers, Sr., and the wife of a third son. The consideration expressed in the deed was "love and affection, and agreement by the grantees to take care of and provide for said Richard Summers, Sr., and Paulina, his second wife, during their natural lives, to treat them kindly in sickness as well as in health, and to provide them a suitable and respectable burial at their death." The deed was dated May 17th, 1879; the grantor, Richard, Sr., died in December, 1879.

The deed was executed and duly acknowledged by Richard Sr., and Paulina his wife, in the presence of Thomas Sutton, the justice who took the acknowledgment, and Aaron Summers, husband of the grantee Mary Summers; the other grantees were Richard Summers, Jr., and Thomas Summers.

After the deed was signed and acknowledged, the justice handed it to Richard Summers, Sr., who handed it to Aaron Summers, the husband of one of the grantees, saying, "take it and give it to some one to keep while I live, then to be recorded." Aaron took the deed, saying to Richard, Sr., "I will give it to Paulina." Richard, Sr., then said to her, "Take it and put it away in the drawer, and take care of it until I die; then it is to be recorded." She took the deed and put it in the drawer, where it remained until Richard, Sr., died. A few days after his death Paulina gave the deed to Aaron Summers, and he had it recorded. After the execution of the deed Richard, Sr., expressed dissatisfaction with the deed, and asked Paulina where it was; when told that it was in the

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drawer, he said that "they had forfeited it; that it had never been delivered, and that, if it had been, the other children could have it set aside; and that, as soon as he got able, he would go to town and have a deed made to suit him." This he said in the presence and hearing of Thomas Summers, one of the grantees. Upon these facts there was no error in the conclusion of the court that the title to the land therein conveyed was vested in the grantees.

The possession by the grantee of a deed regularly executed is *prima facie* evidence of its delivery. *Games v. Stiles*, 14 Peters, 322, 327; *Berry v. Anderson*, 22 Ind. 36.

If a deed be duly delivered in the first instance, it will operate, though the grantee suffer it to remain in the custody of the grantor. *Souverbye v. Arden*, 1 Johns. Ch. 240; *Doe v. Knight*, 5 Barn. & C. 671. •

When a deed is delivered to a third person for the use of the grantee, the deed will take effect from the instant of such delivery, if the grantor parts with all control over the instrument. *Stewart v. Weed*, 11 Ind. 92. Here the deed was actually delivered by Richard Summers, Sr., to the husband of one of the grantees, with the direction, "Give it to some one to keep while I live, then to be recorded."

This was a delivery for the use of all the grantees. *Stout v. Dunning*, 72 Ind. 343. As against the grantor and his heirs, the title passed without any recording. 4 Kent's Com. 456, and was not affected by the direction, "then to be recorded." The directions, however, were faithfully observed; the deed was kept by the depositary, until Richard, Sr., died, and was then recorded. The dissatisfaction expressed by Richard, Sr., after the completion of the transaction, could not impair the effect of the previous delivery of the deed, which was absolute and without any condition affecting the title.

Even where a deed is delivered as an escrow, subsequent instructions by the grantor to the depositary can not change the original nature of the transaction. *Robbins v. Magee*, 76 Ind. 381. Even if there be any doubt as to the original de-

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livery of the deed, yet in this case the deed was kept by the depository, Paulina, until the grantor died, and was then by her delivered in pursuance of the previous directions of the grantor.

The order of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the order of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

No. 8725.

PEDRICK v. POST, ADMINISTRATOR.

SUPREME COURT.—*Decedents' Estates.*—*Appeal Bond.*—*Waiver.*—*Motion to Dismiss.*—After submission by agreement, an appeal will not be dismissed for want of an appeal bond as required by sections 189 and 190, 2 R. S. 1876, p. 557.

CONTRACT.—*Rescission.*—*Sale of Leasehold.*—*Evidence.*—*Receipt.*—When the issue is whether or not a contract for the sale of an interest in certain leaseholds had been voluntarily rescinded, a later contract inconsistent with the first, and made with additional parties, is competent evidence. So, also, is a receipt showing a repayment of money paid upon the first contract.

SAME.—*When Time is of the Essence.*—Unless explicitly or clearly made so in terms, time will not be deemed to be of the essence of a contract for the sale of a leasehold interest in lands.

From the Marion Circuit Court.

W. Morrow, for appellant.

S. Claypool and W. A. Ketcham, for appellee.

WOODS, C. J.—The appellee has moved to dismiss, and also filed a plea in abatement of the appeal in this case, because of the failure of the appellant to file the appeal bond required in such cases.

Under the rule laid down in *West v. Cavins*, 74 Ind. 265, followed in *Gilbert v. Welsch*, 75 Ind. 557, the motion and plea came too late. The bond is required for the benefit of

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the appellee, and may be waived. An appearance and submission of the case by agreement upon the errors assigned, and a failure to raise the objection either by motion or plea until after the expiration of the year within which, by leave of the court, the omission to file the bond might be remedied, should be deemed a waiver. The only difference between the facts in this case and in *West v. Cavins, supra*, is, that in this instance the appellee had not filed a brief upon the merits before making the motion to dismiss, a difference which we do not deem essential.

The cases of *Seward v. Clark*, 67 Ind. 289, and *Bell v. Mousset*, 71 Ind. 347, are not overruled nor modified by the decision in *West v. Cavins, supra*, but are plainly distinguishable.

This is the second appeal in this case; see *Post v. Pedrick*, 52 Ind. 490. Upon the return of the case to the circuit court, the plaintiff, in addition to the complaint which is set out in the opinion delivered upon the former appeal, filed a third paragraph; and, upon leave, the defendant filed an amended answer of six paragraphs to the original complaint, and an answer in three paragraphs to the additional paragraph of complaint. The plaintiff filed five paragraphs of reply, to the third, fourth and fifth of which the court sustained demurrers.

Upon the trial, the court excluded all the evidence offered by the plaintiff except the contract referred to in the first and third paragraphs of the complaint, and instructed the jury to return a verdict for the defendant.

It is claimed, first, that the rulings upon the demurrers to the reply were erroneous. By reference to the opinion in 52 Ind. 490, it will be seen that the first paragraph of the complaint is based upon the following writing:

“On last January 27th, I purchased for sixteen hundred dollars, from William Newman, of Louisville, the two leases he held from Richard Poteet and wife, of Overton county, Tenn., and from B. C. Webb and wife of Putnam, Overton county, Tenn., conveying to him the sole and exclusive right to explore, bore and mine for oil and other things on their lands.

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I handed said leases to William Pedrick, of Richmond, Ind., to examine the title to said conveyances, and, when found correct, to have the same recorded in the records of the said counties; and I hereby obligate myself to convey and transfer one-half of my interest in said leases to said Pedrick, for one-half of the said purchase-price, in case he pays me the respective money within three months from and after this date; also, the said Pedrick paid me to-day on account of said leases the sum of five hundred dollars, which said money I promise to refund him in case he should find the title to said leases deficient, and therefore prefer not to purchase said one-half interest; further, said Pedrick is to inform me within ten days from and after this date, whether the title to said leases is good or not, and whether he wants to buy said one-half interest therein, for the reason that said William Newman, either wants the purchase-money by the 25th inst., or that his said sale and transfer of the said leases to me be cancelled and annulled.

“Witness my hand and seal at Indianapolis, this 11th day of February, 1868.” (Signed) “G. SCHURMANN. [SEAL.]”

The allegations of the paragraph are to the effect that Schurmann did not convey to the appellant an interest in the leases, but sold the same to other parties.

The third paragraph of the complaint, after setting out the same writing, charges that, after the payment of the money by the appellant as stated, it was mutually agreed between the parties, Schurmann being yet in life, that the latter should not convey or transfer an interest in said leases, but should repay to the appellant the said sum of \$500, and accordingly on the 14th day of September, 1868, he paid to the appellant the sum of \$35 thereon, for which the appellant signed and delivered to him a receipt, a copy of which is set out; that excepting said sum and \$50, for which the appellant made his note to the deceased, the remainder of the said sum of \$500 is due and unpaid.

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The second paragraph was for money lent to and had and received by Schurmann for the use of the plaintiff.

A statement of the averments of the several paragraphs of answer and reply is not necessary. Besides the general denial, the reply contained special paragraphs wherein were alleged matters inconsistent with the facts stated in the respective paragraphs of answer to which they were addressed. But this is only an argumentative way of denying; the facts so averred might have been proved under the general denial, and, consequently, there was no available error in the rulings upon the demurrers.

It remains to consider whether or not the court erred in overruling the motion for a new trial.

The appellant offered in evidence the following receipt, shown to be in the handwriting of Schurmann, and given to him by the appellant, to wit:

“Repaid me by G. Schurman again, from the payment I made him on last February the 11th, on account of my half interest in the Webb and Poteet leases, in Overton county, Tenn., thirty-five dollars, on this September 14th, 1868.”

(Signed) “WILLIAM PEDRICK.”

The appellant also offered in evidence a lease shown to have been made by Schurmann to the appellant and three others, bearing date September 19th, 1868, whereby Schurmann leased and underlet to them all his rights and privileges under the leases referred to in the contract between Schurmann and the appellant. The appellee objected to the admission of these documents, because irrelevant, immaterial and incompetent.

We think they had a direct bearing upon the question whether there had been a voluntary rescission of the contract as alleged in the third paragraph of the complaint, and should have been permitted to go to the jury upon that issue.

Under that paragraph, and perhaps under the second paragraph, of the complaint, the appellant was entitled to recover the money paid upon the contract, upon proof that, by mutual consent, the parties had annulled it; and, for this purpose,

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the proposed evidence was competent, whatever construction ought to be put upon that contract. If, as the appellee contends, time is made the essence of the agreement, and the appellant was not entitled either to an interest in the leases or to a return of the \$500, except upon payment of the \$300 within the stipulated time, still, if there was a rescission, he became thereby entitled to a return of the money paid; and the evidence offered was competent, though perhaps less significant, than if time should not be regarded as of the essence of the contract.

Looking, however, to the face only of the contract, we do not think that time was made or intended to be essential, except in reference to the ten days allowed for the investigation of the title of the lessors. Stripped of this stipulation and its incidents, which play no part now, because the soundness of the title is not disputed, the contract may be read in this wise: "I hereby agree to transfer to Wm. Pedrick one-half of my interest, etc., for \$800, in case he pays the money within three months from this date. He now pays \$500 of that sum." Signed, etc.

If, as contended, it was of the essence of this agreement that the remainder of the price should be paid within the time named, it was an agreement to pay absolutely \$500 for a three-months option to buy something at the price of \$300. If not incredible, this would be plainly inequitable, and, unless expressed in unequivocal terms, should not be deemed to have been the intention of the parties. Indeed, if apt words had been chosen to express such a design, it may be doubted whether the agreement could be enforced in equity. See *Spath v. Hankins*, 55 Ind. 155.

It is plain, however, by the terms of this agreement, that the \$500 were not paid for an option to buy, but as a part of the price of a purchase already made.

Judgment reversed, with instructions to grant to the appellant a new trial.

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No. 8651.

HEAGY ET AL. v. THE STATE, EX REL. FORKNER, AUDITOR.

COUNTY TREASURER.—Bond.—Taxes.—County Auditor.—Relator.—The county auditor was, by the act of 1872, concerning taxation, section 185, the proper relator in a suit on a county treasurer's bond for failure to account for and pay over taxes collected.

SAME.—Evidence.—Settlement Sheet.—Estoppel.—Constitutional Law.—Repeal of Statute.—The act of December 21st, 1872, making the stated account with the county treasurer conclusive evidence against the treasurer and his sureties, was repealed, by necessary implication, by the act of March 31st, 1879; and the latter act, made to operate retrospectively, was within the power of the Legislature to pass.

PRACTICE.—Cross-Examination.—Supreme Court.—Where a cross-examining question is excluded, it is not necessary in order to make an available question in the Supreme Court, that the evidence expected to be elicited shall be stated to the trial court.

SAME.—Argument of Counsel.—In civil causes, where there are no questions of fact in the evidence, the court may refuse to permit argument to the jury.

From the Madison Circuit Court.

W. R. Pierse, C. B. Gerard, H. D. Thompson, J. W. Sansberry, E. P. Schlater, M. S. Robinson and J. W. Lovett, for appellants.

R. Lake, J. A. Harrison, W. March, C. L. Henry and H. C. Ryan, for appellee.

ELLIOTT, C. J.—The question which first requires consideration is, whether the auditor of the county is the proper relator in an action upon the official bond of the county treasurer where the breach alleged is the failure to account for and pay over taxes. The answer to this question is made by section 185 of the tax law of 1872, which reads thus: "In any such case, the county auditor, on being instructed to that effect by the Auditor of State, or by the board of county commissioners, shall cause suit to be instituted against such county treasurer and his sureties." 1 R. S. 1876, p. 117. The complaint in the present action shows that the relator was the auditor of Madison county, and that he was instructed by the

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Auditor of State to bring the action. There can be no doubt that he is the proper relator.

Appellee called and examined a witness, and the appellants, upon cross-examination, propounded several questions which the court refused to allow the witness to answer. The appellee argues that, as the appellants did not make offer of what the witness would testify, no question is presented. It is the rule, where a party is examining his own witness, that he must state to the court what facts he can and will prove if the evidence is ruled admissible. This rule does not apply where questions are asked upon cross-examination. The cross-examining party is not bound to state what facts he expects the witness to prove.

We think the testimony sought to be elicited by these interrogatories was relevant and material. The appellee had introduced in evidence a certified settlement sheet, and the testimony sought by the excluded questions was in explanation, and perhaps in contradiction, of the statements of that sheet. We can readily see that the testimony might have exerted a controlling influence upon the case. It is fairly inferable that it would have greatly lessened the burdens of the appellants who were sureties upon the bond of the treasurer who had failed to pay over the taxes collected by him. The court erred in denying the appellants the right to have answers made by the witness to the questions propounded by them upon cross-examination.

The appellants at the proper time asked leave to make an argument to the jury in behalf of their clients. This request was denied. The theory upon which the court proceeded evidently was that the settlement sheet estopped appellants from denying any of the statements it contained. If the report and settlement did operate as an estoppel, then, doubtless, there was no question of fact to be argued, and we suppose that in civil actions, where all the questions are purely of law, entirely unmixed with questions of fact, the court may decline to permit counsel to address the jury. Under the decisions

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of this court, as they stood at the time of the trial, the trial court ruled rightly in declaring the report to estop the treasurer and his sureties. Those decisions have been overthrown. The case of *Ohning v. City of Evansville*, 66 Ind. 59, expressly overrules them, and establishes a radically different doctrine.

It is but just to say that it is apparent that the judge who tried the case was influenced and controlled in his ruling excluding the evidence to which we have referred by the doctrine of the cases overturned in *Ohning v. City of Evansville*, *supra*.

Judgment reversed.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—In the argument upon the petition for a rehearing, our attention is called to a provision in the act of December 21st, 1872, which reads as follows: "The stated account of the treasurer against whom an action is brought, certified by the Auditor of State, as truly transcribed from the account current against such treasurer on the books of said auditor's office, authenticated by the State seal, shall be conclusive evidence of the demand of the State against such treasurer and his sureties," and we are asked to hold that this statutory provision makes the stated account conclusive evidence upon all matters embraced in it.

It is very doubtful whether the Legislature can enact a statute declaring what shall constitute conclusive evidence.

Wantlan v. White, 19 Ind. 470; *White v. Flynn*, 23 Ind. 46; *Cooley Const. Lim.* 454. But we do not find it necessary to make any decision upon that point.

We think the provision relied on was not in force at the time of the trial. An act was passed on the 31st of March, 1879, which declares that settlements made by officers shall not be conclusive. It is true that this act does not in terms repeal the earlier statute, but there is an inconsistency that can not be reconciled. It is evident that the Legislature meant to do what the court has done, overturn the doctrine

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of estoppel as declared in the case of *State, ex rel., v. Grammer*, 29 Ind. 530, and leave the officers' account open for investigation in cases of fraud or mistake.

The second section of the act provides that "the provisions of the preceding section shall extend to all persons who have been, as well as those who now are, and shall hereafter be, county, township, or school officers." Acts 1879, p. 108. This provision is sufficiently comprehensive to embrace the case in hand, and the only question is as to the power of the Legislature to adopt such an act.

Public funds belonging to governmental subdivisions of the State are so much within the control of the Legislature, that it is not easy to assign limits to the legislative authority over them. *City of Indianapolis v. Indianapolis Home, etc.*, 50 Ind. 215. But we do not care to investigate this question now, for we think it plain that if the question were between private individuals, instead of between the State and its officers, the Legislature would have the power to change the rules of evidence.

There are many cases holding that it is within the power of the Legislature to change the rules of practice and of evidence. Cooley Const. Lim. (4th ed.) 353, 457, 460. This author, in speaking of rules of evidence, says: "Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the Legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden." This principle has been recognized by this court, and in a very recent case applied to a prosecution for felony. *Robinson v. State*, 84 Ind. 452; *Dinckerlocker v. Marsh*, 75 Ind. 548.

Petition overruled.

Smith v. Rowles et al.

No. 9915.

SMITH v. ROWLES ET AL.

SHERIFF'S SALE OF REAL ESTATE.—*Notice by Publication.*—*Posting Notices.*—*Construction of Statute.*—Under section 467 of the civil code of 1852, sec. 757, R. S. 1881, the advertisement of a sheriff's sale of real estate, "for at least twenty days successively," has exclusive reference to posting up written or printed notices of the sale, and does not qualify or control the provision requiring the advertisement by publication in a newspaper of the county, for three weeks successively, which means a publication for twenty-one days, excluding either the date of the first publication or the day of the sale.

From the Hamilton Circuit Court.

F. M. Trissal, for appellant.

W. Neal and *J. F. Neal*, for appellees.

Howk, J.—This was a suit by the appellant against the appellees to obtain a decree and judgment of the court, declaring a sheriff's sale and deed of certain real estate in Hamilton county to the appellee Mary Rowles, to be illegal, irregular and void, and to have no foundation, force or effect. The appellees' demurrer to appellant's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, was sustained by the court, and to this ruling appellant excepted. He declined to amend or plead further, and judgment was rendered that he take nothing by his suit, and that the appellees recover of him their costs in this action expended.

Error is assigned by appellant upon the decision of the circuit court in sustaining appellees' demurrer to his complaint. The only objection stated in the complaint to the validity of the sheriff's sale and deed is that notice of the day of sale was not given for the period of time prescribed in the statute, prior to such sale. It was alleged in the complaint that the day fixed for the sale was the 18th day of April, 1880, and that the notice of such sale and of the day therefor was given by publication thereof in a weekly newspaper, printed in Hamilton county, on the 19th and 26th days of March,

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and the 2d day of April, 1880, "and not at any other or different times or dates." At the time the sale in question was made, and the notice thereof was given, the time and manner of advertising a sheriff's sale of real estate were fixed and prescribed in and by the provisions of section 467 of the civil code of 1852, as such section was amended by an act approved February 2d, 1855. As applicable to the question under consideration, this section provided as follows: "The time and place of making sale of real estate, on execution, shall be publicly advertised by the sheriff, * * * next before the day of sale, * * * for three weeks successively, in a newspaper printed nearest to the real estate, if any such newspaper be printed within the jurisdiction of the sheriff." 2 R. S. 1876, p. 217; sec. 757, R. S. 1881. The advertisement "for at least twenty days successively," required by the statute, has reference exclusively, we think, to the "posting up written or printed notices" of the sale; and that provision does not qualify or control in any manner the advertisement by publication in a newspaper of the county or within the sheriff's jurisdiction.

The provision of the statute, requiring an advertisement of the time and place of sale for three weeks successively in a newspaper, is fully complied with when it appears, as it does in this case, that the advertisement has been published each week of the three successive weeks, and that twenty-one days have elapsed between the date of the first publication and the day fixed for the sale. *Rhoades v. Delaney*, 50 Ind. 468.

In *Loughridge v. City of Huntington*, 56 Ind. 253, it was said: "Publication for three consecutive weeks means a publication for twenty-one days, and not simply three insertions in a weekly newspaper, which would ordinarily cover a period of but fifteen days." In *Meredith v. Chancey*, 59 Ind. 466, the precise question now under consideration was before this court. It was there said: "We do not think the last advertisement need to have been published three weeks, or twenty-one days, before the sale. * * * But we are of

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opinion, that the Legislature intended that the first advertisement should be made full three weeks, or twenty-one days, before the day of sale. To be sure, the written or printed notices need be posted up only twenty days next before the day of sale, but the advertisement is required to be published in the newspaper 'for three weeks successively,' and this means three weeks successively next before the day of sale. Three weeks are twenty-one days, and a publication by advertisement in a newspaper for a period of less than twenty-one days is not a compliance with the statute."

In the case at bar, the facts stated in the complaint showed very clearly, we think, that the sheriff fully complied with the requirements of the statute, in that he publicly advertised the time and place of the sale for three weeks successively, or twenty-one days, in the proper newspaper, next before the day of sale. The court committed no error, therefore, in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

No. 9693.

PRICE v. MALOTT ET AL.

MORTGAGE.—*Personalty and Realty.*—*Fixtures.*—*Mills.*—*Pleading.*—Suit to foreclose a mortgage describing as "personal property" the undivided half of a grist-mill, stationary boiler and engine, and a stationary saw-mill. Answer that the property was a stationary steam saw and grist-mill; that the defendant purchased the same in good faith without notice, and that the mortgage had been recorded only in the record of chattel mortgages.

Held, that the answer was bad, and did not show that the property was real estate.

From the Grant Circuit Court.

J. F. McDowell, G. L. McDowell and J. A. Kersey, for appellant.

Price v. Malott et al.

FRANKLIN, C.—Appellant sued appellees Nance and Shock on three several promissory notes, and to foreclose a mortgage given by Nance to secure their payment, alleging that the other appellees claimed an interest in the mortgaged property, and making them parties thereto to answer as to such interest.

Appellee Millicent Malott answered by setting up ownership of the mortgaged property, freed from the mortgage, to which a demurrer was overruled, and a reply filed. Other issues were formed, and a trial had before the court; a finding was made for the plaintiff against Nance, and for the defendant Millicent Malott, and against the plaintiff as to the foreclosure of the mortgage. Over a motion by the plaintiff for a new trial, judgment was rendered upon the finding.

The plaintiff has appealed, and assigned as errors the overruling of the demurrer to the first paragraph of Millicent Malott's answer, and the overruling of his motion for a new trial. The paragraph of answer demurred to reads as follows:

“Comes now Millicent Malott, who has been admitted as a defendant in this cause, and for answer to all of the complaint, except the parts in relation to the wagon, bob-sleds and blacksmith tools, herein says, that she is now, and was at and before the commencement of this suit, the owner of the property in dispute, which is a stationary steam saw and grist-mill; that she purchased the same of Matthew McGrew and David Overman, who purchased the same from one Hugh Cox, the then owner thereof, and had the same conveyed to themselves as free and clear from all incumbrances. She avers that she purchased the same from said McGrew and Overman on the same day on which they purchased the same from said Hugh Cox, and that said McGrew and Overman conveyed the same to her as free and clear from all incumbrances. She avers that when she purchased and paid for the same she had no notice whatever or knowledge of the mortgage named in the complaint herein; that before she so purchased the same she caused an examination to be made of the proper records of mortgages of real estate in the re-

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corder's office of Grant county, in which said property was and is situated, to discover if any mortgage liens were entered of record against the same; that there was not then any entry of record of said mortgage in said mortgage record. She avers that said mortgage had not been in any other manner recorded in said record; but that the same had been and was recorded in the record of chattel mortgages, into which she did not look or examine. Defendant avers that she paid a full and fair value and price for said property, and had done so before she had any notice of the mortgage in the complaint named. Wherefore she says that, by virtue of her said purchase, the title to said property vested in her clear from any liens of said mortgage," etc.

The question presented by this demurrer is, does the recording of the mortgage in the record of chattel mortgages operate as constructive notice to the purchaser of the mortgaged property?

The mortgage was dated and recorded March 25th, 1878; said appellee purchased the mortgaged property in July, 1879. Appellee did not claim as against the mortgage the wagon, bob-sleds and blacksmith tools, but only the saw and grist-mills.

The mortgage referred to in the answer is made a part of the complaint, and a copy of the same filed therewith. The answer is to be considered with reference to the charge in the complaint. The mortgage is in the chattel form of a bill of sale, and describes the mortgaged property as follows: "The following described personal property, to wit: The undivided one-half of one grist-mill, with three run of burs, two for wheat and one for corn, stationary boiler and engine combined; also the undivided half of a stationary saw-mill and saw frame, and all the fixtures thereunto belonging," etc. Then follows a description of the property not claimed by appellee.

The answer is not based upon any claim to the land upon which the mills were situated, so as to connect the ownership of the realty with the ownership of the mills.

There is nothing in the answer that shows that the mills or any of the fixtures therein were in any manner attached to the realty, or that the mills and all the machinery and fixtures therein might not have been easily detached and readily removed without any damage to the freehold. Indeed, the answer shows that the mills had been traded around from one to another without regard to the freehold upon which they were situated. It rather shows that the parties were intending to and did treat them as personal property, or, at most, not beyond a chattel real. *Young v. Baxter*, 55 Ind. 188.

A house, if treated as personal property, may be held as such. *Foy v. Reddiok*, 31 Ind. 414.

A tenant may remove fixtures and improvements erected for his own use, at any time during the tenancy, and, by agreement, afterwards; and, where there is a right to remove, they are treated as personal property. *McCracken v. Hall*, 7 Ind. 30; *State, ex rel., v. Bonham*, 18 Ind. 231; *Cromie v. Hoover*, 40 Ind. 49; *Allen v. Kennedy*, 40 Ind. 142.

A dwelling-house is presumed to be realty until shown to be personalty. But it does not follow that the owner of a house necessarily makes it real estate by placing it on the land of a third person. *Griffin v. Ransdell*, 71 Ind. 440.

Saw and grist-mills are not necessarily real estate; they are used in mercantile business, and do not carry with them those ideas of fixedness and permanency that a dwelling-house does; they may or may not be real estate, dependent upon the circumstances and intentions of the parties. Where one erects such mills upon his own land, the presumption might be in favor of their being a part of the realty; but where he erects them upon the lands of another, the presumption would be equally as strong in favor of their being personalty. And where we only have the fact of one's owning the mills without knowing who owns the land upon which they are situated, perhaps no presumption would arise as to whether they were realty or personalty, and the facts must be resorted to in order to determine which they are.

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In the case under consideration, the mortgage, being a part of the complaint, alleges that the mills were personal property; this the paragraph of answer does not deny, nor state facts sufficient to necessarily make them real estate. It, therefore, in this particular, fails to answer the complaint. As to the complaint, the record is constructive notice of the mortgage, and the court below erred in overruling the demurrer to the answer.

The bill of exceptions containing the evidence was not filed during the term at which the trial was had and the judgment rendered, and the record does not show that time was given to file it afterwards. No question is presented for consideration under the overruling of the motion for a new trial.

For the error in overruling appellant's demurrer to the first paragraph of appellee Millicent Malott's answer, the judgment below ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below as to appellee Millicent Malott be and it is hereby in all things reversed, and that the cause be remanded, with instructions to the court below to sustain the demurrer to the first paragraph of appellee Millicent Malott's answer, and for further proceedings in accordance with this opinion; and that the judgment as to the other appellees be and the same is in all things affirmed, at appellees' costs.

No. 8653.

WALDRON v. SANDERS ET AL.

HUSBAND AND WIFE.—*Wife's Personality at Common Law.—Reduction to Possession.*—Before 1851 the common law in respect to husband and wife was in force in Indiana, whereby the wife's personal estate, such as money, goods, chattels, and movables which she had in possession at the time of the marriage, vested immediately and absolutely in the husband; and so of money in the hands of her guardian, from whom it was received by the husband.

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SAME.—Common Law.—Trust.—If at common law a wife, having money in her own right and custody, delivers it to her husband under his promise to invest it in real estate for her and in her name, but he, without her knowledge, takes the title in his own name, he does not hold the land in trust for her, because the money was in fact and in law not hers but his. *Tracy v. Kelley*, 52 Ind. 535, distinguished and criticised.

From the Lawrence Circuit Court.

J. H. Loudon and *R. W. Miers*, for appellant.

J. W. Buskirk and *H. C. Duncan*, for appellees.

WOODS, J.—Action by the appellant against the appellees to recover the possession of real estate. The appellee Isom W. Sanders had made an assignment for the benefit of his creditors, and had conveyed the lands in question, his wife and co-appellee not joining, to the assignee, who, in the execution of the trust, had sold and conveyed to the appellant. The appellee Elizabeth Sanders filed a cross complaint, wherein she charged that eighty acres of the land were purchased with her money, by her husband, under an agreement to make the purchase for her, and that, in violation of this agreement, without her knowledge, he had taken the deed in his own name, and had included the land in his deed of assignment; that the appellant purchased with notice of her rights.

The jury found in favor of the said Elizabeth in respect to the eighty acres, and the court gave judgment accordingly.

The appellant insists, and we think correctly, that the verdict is not sustained by the evidence. In reference to the purchase and ownership of the land, the only testimony is that of the appellees, which was as follows:

Mrs. Sanders: "I was married to my co-defendant, Isom W. Sanders, in the fall of 1835; the next spring we moved on the eighty-acre tract of land described in the complaint; we rented it of John Sanders, my husband's father; some time in the fall or winter of 1837, I received about \$300 in money from my father's estate in Kentucky; my husband brought it to me; I kept it in the house under the head of my bed, for a short time; I told Mr. Sanders, my husband,

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that I liked that eighty tract of land better than the one he had entered in Greene county, and that I wanted him to buy it for me, for a home; I gave him the money, and told him to buy it for a home for me; I did not know that the deed was made to my husband, until after the assignment in 1875; I gave no instructions as to how the deed should be made, or in whose name it should be made; just said I wanted it for a home; did not consent or object to the deed being made to him; do not remember how long the money was in the house; there was about \$300 of it; do not think I counted it; do not remember size or number of the bills; do not know that it came from my father's estate, except that my husband came from there, and said it did; he had gone to Kentucky at my request, to get money coming to me from my father's estate; I did not see the money paid for the land; was not present when the deed was made; the deed, after it was made, was brought to our house, and has been there ever since, in a drawer; our house at that time was a little log cabin, with only one room; I can read and write; never paid any taxes; made no enquiry about taxes; paid no attention to the title to this eighty-acre tract, and did not know in whose name the title was, until a short time after the assignment; knew that the deed was made to my husband from that time on; I knew that Mr. Houston, the assignee, had advertised this eighty-acre tract for sale, with the rest of my husband's land; knew it some time before the sale, several weeks; did not attend the sale; knew the day of the sale, and knew that my husband started there; was able to ride, but did not go; did not authorize any one to make an announcement for me, that my money paid for the land, or that I claimed any interest in the land; never had any conversation with Mr. Waldron about it; after the assignment and before the sale, I told Mr. Houston that the eighty-acre tract had been bought and paid for with the money I inherited from my father's estate, and that I expected to claim it, and have a home there in my old days; I did nothing in the way of giving notice at the sale;

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I told Mr. Sanders to ask attorneys Rhoads & McNutt what I should do, and he did, and they said I need not do anything."

The appellee Isom W. Sanders testified: "In the fall of 1837 I brought from Kentucky about \$300 from my wife's former guardian; it was my wife's money; she and I talked about investing it in land, and what land we should invest it in; she said she would rather I would buy the eighty-acre tract on which we were living, which was the eighty acres described in plaintiff's complaint; she gave me the money, and said she wanted me to buy the eighty-acre tract for a home for her; I took the identical money she gave me, and gave it to my father for said eighty acres; the deed was not made for some two or three years; my wife did not know, to my knowledge, that the deed had been taken in my name until after the assignment; she gave me no instructions when she gave me the money, or at any other time, as to how the deed should be made; I had the deed recorded; I paid the taxes; I knew the deed was made to me; I made an assignment on the — day of November, 1875; I put this eighty-acre tract of land in the schedule with the other land I owned; made just such papers as my lawyer directed; I suppose I swore to my schedule."

We deem it hardly inferable from this evidence that Mrs. Sanders understood that the title was to be taken in her name. The husband testifies that she gave no instructions how the deed should be made. But, waiving this and assuming that the evidence is sufficient to warrant an inference that there was an understanding, express or implied, between them that the title should be taken in her name, we are compelled to the conclusion that there was no resulting trust in favor of the wife, because, as the law then was, the money was not hers.

At the time the money was received of her guardian, and when invested in the land, the common law, in respect to the rights of husband and wife, was in force in this State, and presumably so in Kentucky, whence the money was brought. That law is thus stated by Chancellor Kent (2 Com., p.

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143): "As to personal property of the wife, which she had in possession at the time of the marriage in her own right, and not *en autre droit*, such as money, goods, and chattels, and movables, they vest immediately and absolutely in the husband, and he can dispose of them as he pleases, and on his death they go to his representatives, as being entirely his property." And it has been declared, that "Money in the hands of a guardian is deemed, in law, to be in the possession of the ward, and that possession of the ward became the possession of her husband upon her marriage;" and it does not, like a mere *chose in action*, require a reduction to actual possession in order to make it the property of the husband. *Standeford v. Devol*, 21 Ind. 404; *Miller v. Blackburn*, 14 Ind. 62.

It clearly follows, that while yet in the hands of the guardian in Kentucky, the money in question was the money of Isom W. Sanders; it was his when in his actual possession; it was his when in the actual custody of his wife, "under the head of her bed;" he could have reclaimed or seized upon it at any time; and, if when she returned it to him, he promised to invest it in the land for her and in her name, the promise was invalid, and affords no ground for either legal or equitable relief. If a reduction to possession were conceded to have been necessary, the taking and holding of the title in his own name were clearly an effectual reduction.

Counsel for the appellee cite *Barnett v. Goings*, 8 Blackf. 284, *Totten v. McManus*, 5 Ind. 407, *Wilkins v. Miller*, 9 Ind. 100, *McDonald v. McDonald*, 24 Ind. 68, *Tracy v. Kelley*, 52 Ind. 535, and *Taggard v. Talcott*, 2 Edw. Ch. 628; but these cases are all plainly distinguishable, and the distinction is clearly indicated in *Miller v. Blackburn*, *Standeford v. Devol*, and *McDonald v. McDonald*, *supra*.

Counsel suggest, and, indeed, it is said in *Tracy v. Kelley*, *supra*, that *Miller v. Blackburn* was overruled by *McDonald v. McDonald*; but the point considered in that case, in connection with which a reference is made to the other, was whether there could be a resulting or implied trust if there

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had been an express parol agreement for the same trust as, without the agreement, would be implied; and, in support of the view there declared, reference is made to the dissenting opinion of HANNA, J., and to the opinion of WORDEN, J., on the petition for a rehearing in *Miller v. Blackburn*; but if there is any inconsistency between the two cases in respect to the principles now under consideration, or in reference to their proper application, it has not been pointed out, and we do not perceive it.

In *Tracy v. Kelley* the money was devised for the especial purpose of purchasing for the devisee a home in her own name, and, of course, could not be reduced to the husband's possession, as his own, without her consent.

The doctrine of *Miller v. Blackburn* has been re-affirmed in *Buchanan v. Lee*, 69 Ind. 117, and in the more recent case of *Westerfield v. Kimmer*, 82 Ind. 365.

Judgment reversed, with costs, and with instructions to sustain the appellant's motion for a new trial.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—We have given the argument of counsel upon the petition full consideration, and have carefully re-examined the evidence, but find no reason for changing the ruling announced in our former opinion.

The rule of the common law was in force when Isom Sanders received the money from his wife, and, under that rule, it became his the moment it was reduced to possession. The evidence not only shows that he reduced it to possession, but it also shows that he used it in the purchase of property which he bought in his own name, and which, for a long series of years, was treated as his.

We think it very easy to perceive the difference between this case and *Tracy v. Kelley*, 52 Ind. 535. In that case the husband received the money under a bequest directing that it be used for the specific purpose of purchasing property for his wife. Having received the money under the conditions

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imposed by the bequest, and having no right to take it upon any other, he could not reduce it to possession so as to make it his own. In the present case there is no such element as controlled the decision in the one cited.

Petition overruled.

No. 9567.

CLARK ET AL. v. THE CITY OF SOUTH BEND.

CITY.—*Powers.—Fire Ordinance.*—An ordinance prohibiting the keeping, on any one block, at one time, of more than five tons of straw, unless protected by a fire-proof enclosure, is authorized by the statute concerning cities. R. S. 1881, sections 3106, 3155, 3198, 3199.

From the St. Joseph Circuit Court.

W. G. George and *L. Hubbard*, for appellants.

ELLIOTT, J.—The controlling question in this case is whether the common council of a city incorporated under the general law has power to adopt an ordinance containing the provision, "That no person shall keep, within the territorial limits of said city, on one block at one time, a quantity of straw exceeding five tons, unless the same be enclosed within a fire-proof enclosure."

The appellants contend that the municipality had no power to adopt and enforce this ordinance, because the power to prevent the accumulation of combustible materials is not expressly conferred. This is a more narrow view of the subject than the books warrant counsel in assuming. A municipal corporation has such powers as are expressly granted, and also such implied or incidental ones as are necessary to carry into effect the express powers and effectuate the object of the corporate existence. It was long ago declared that the power to prevent danger from fire is an incidental one, belonging to all municipal corporations. A quaint statement of the rule

85	276
129	206
85	276
130	155
85	276
132	581
85	276
138	53
85	276
148	25
85	276
162	54

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is that found in Bacon's Abridgment; it reads thus: "So if a by-law be made in London, that none shall make a hot-press, nor use it within the city, under the penalty of £10, for the making thereof, and £5 for the use thereof, this is a good by-law; because the use of those presses is dangerous with regard to fire, and also deceitful, inasmuch as they make cloths and stuff look better to the eye than in truth they are." 2 Abridg. 147. Judge Dillon declares that the power to prevent fires is among the incidental ones of a municipal corporation, and is in its nature a police power necessary for the proper administration of the municipal government. 1 Dillon Municipal Corp. (3d ed.), sections 141 and 143.

It is said by counsel that the statute enumerates certain powers, and that this specific grant excludes all other powers except those enumerated. We do not understand the rule to be as stated by counsel. Judge Dillon says: "The true rule in such cases may, perhaps, be correctly expressed to be, that the enumeration of special cases does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions." 1 Dill. Munic. Corp. (3d ed.), sec. 316, *n.* This statement of the law agrees with the view of this court declared in *City of Indianapolis v. Indianapolis, etc., Co.*, 66 Ind. 396. There are other provisions concerning the power of the municipal authorities to prevent and subdue fires, than those enumerated in section 53 of the general act, and, taking them all into consideration, there can be no doubt that the Legislature meant to confer broad powers upon the municipalities in the matter of providing against danger from fires. R. S. 1881, sections 3198, 3199.

We have a provision in our general act which corresponds to what the courts and writers call the general welfare clause; that provision is as follows: "The common council shall have power to make other by-laws and ordinances not inconsistent with the laws of this State, and necessary to carry out the objects of the corporation." R. S. 1881, sec. 3155. It has been

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often held, that, under the general welfare clause, corporations may regulate the storage and transportation of gunpowder; the manner of constructing buildings; the places where wooden buildings may be built; the manner in which ashes shall be stored and disposed of; and that they may prohibit the storing of inflammable oils in insecure structures. *Williams v. City Council, etc.*, 4 Ga. 509; *Frederick v. City Council, etc.*, 5 Ga. 561; *City Council, etc., v. Elford*, 1 McMullen (S. C.), 234; *Brady v. Northwestern, etc., Co.*, 11 Mich. 425; *Douglass v. Commonwealth*, 2 Rawle, 262; *Wadleigh v. Gilman*, 12 Maine, 403 (28 Am. Dec. 188); *Vanderbilt v. Adams*, 7 Cowen, 349; *Mayor, etc., v. Hoffman*, 29 La. An. 651 (29 Am. R. 345); 1 Dill. Mun. Corp. (3d ed), section 143.

The collection in great quantities, in this case of one hundred tons, of a material so easily ignited as straw, is an act which the municipal authorities may, as a matter of general welfare, legislate against; and, certainly, it is not going beyond their powers to require that the material shall be kept within a fire-proof enclosure. We are not deciding that such material in any quantity may not be brought within the limits of a city, but we do decide that the municipal authorities may make reasonable provision for its storage while within the corporate boundaries, and that requiring it to be kept in a proper enclosure, is not an unreasonable exercise of the power to legislate for the general welfare of the municipality.

The ordinance is not an unreasonable one. The collection in one heap of five tons of inflammable material, and leaving it without protection, and exposed to the danger of ignition from the acts of careless or malicious passers-by, is an evil which the municipal authorities are justified in taking measures to suppress and prevent, and an ordinance, enacted for the purpose of compelling a man who gathers such a quantity of material together to properly protect it, can not justly be characterized as unreasonable.

The ordinance is not in derogation of common right. A man has no right to collect on his own premises and leave un-

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protected a great quantity of combustible material. If one man may collect great quantities of inflammable material and leave it unguarded, so may another, and another, and thus an entire city be placed in peril. The truth is, there is no such thing as a common right to do, on a man's own premises or elsewhere, an act which puts in jeopardy all surrounding property.

Judgment affirmed.

35 279
123 25

No. 9114.

THE INDIANAPOLIS, DECATUR AND SPRINGFIELD RAILROAD
COMPANY v. PUGH.

PRACTICE.—*Bill of Exceptions Filed After Term.*—*New Trial.*—A ruling made during the trial of a cause can not be preserved by bill of exceptions filed after the term, unless time was given within which to file it, during the term at which the ruling was made; nor can the court at a subsequent term, though the motion for a new trial was not passed upon until such term, preserve its ruling made at a former term, by granting time within which to file bills of exceptions.

SAME.—*Evidence.*—*Instructions.*—*Record.*—If a motion for a new trial is passed upon at a term subsequent to the term of trial, the court may then grant time within which to file a bill of exceptions, embracing the evidence and the ruling upon the motion, but such bill will not preserve any ruling made during the trial, and instructions found only in such bill will not be regarded as a part of the record.

RAILROAD.—*Appropriation of Land for Right of Way.*—*Damages.*—*Evidence.*—*Opinion of Witness.*—*Instruction.*—In a proceeding by a railroad company to appropriate a strip of land for its right of way through a farm, it is not error to instruct the jury that they may consider the opinions of witnesses as to the value of the land immediately before the appropriation, and the value of the several parcels immediately after the appropriation, for the purpose of determining the damages sustained by the appropriation.

From the Superior Court of Marion County.

A. L. Roache, E. H. Lamme, J. E. McDonald and J. M. Butler, for appellant.

B. Harrison, C. C. Hines, W. H. H. Miller and J. S. Tarkington, for appellee.

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BEST, C.—The appellant appropriated a strip of land for its right of way through the appellee's farm; damages were assessed by appraisers; exceptions were filed to the award, the cause tried and a verdict returned for the appellee. The appellant moved for a new trial, the motion was overruled, an exception taken and final judgment rendered upon the verdict. The appellant appealed to the general term; the judgment was affirmed, and this appeal is from the judgment of the general term, affirming the judgment of the special term.

The error assigned at general term, and relied upon here for the reversal of the judgment, was that the court erred in overruling the motion for a new trial. The only causes embraced in the motion for a new trial, and for which it is insisted the court should have sustained it, arise upon the rulings of the court in admitting and excluding testimony, and in giving and refusing to give instructions. These rulings occurred during the trial, and the appellee insists that, as no bill of exceptions was filed during the term, and no time was granted within which to file a bill after the term, the bill thereafter filed presents no question concerning them. The cause was tried and a motion for a new trial was made at the December term, 1879, but no bill was filed at that term, nor was any time asked or given within which to file a bill of exceptions. At the next term of the court the motion for a new trial was overruled, an exception reserved and sixty days time given within which to file bills of exceptions. Within the time limited, a bill was filed which embraces the evidence, the instructions and the various rulings made during the trial. The instructions of appellant are not otherwise in the record, and, in this condition of the record, we think the point of the appellee well taken. A ruling made at one term of the court can not be preserved by filing a bill of exceptions at a subsequent term, unless time was given within which to file it during the term at which the ruling was made; nor can the court at a subsequent term, though the motion for a new trial was not passed upon until such term, preserve its rulings made

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at a former term, by granting time within which to file bills of exceptions. *Rinehart v. Bowen*, 44 Ind. 353; *Sohn v. Marion, etc., Gravel Road Co.*, 73 Ind. 77; *Rhyan v. Dunnigan*, 76 Ind. 178; *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110.

If a motion for a new trial is passed upon at a term subsequent to the return of the verdict, the court may then grant time within which to file a bill of exceptions, embracing the evidence and the ruling upon the motion, but such bill will not preserve any ruling made during the trial. *Kendel v. Judah*, 63 Ind. 291; *Backus v. Gallentine*, 76 Ind. 367.

Nor will such bill bring instructions into the record; it only brings the evidence and the ruling of the court upon the motion, and, therefore, if instructions are found only in such bill, they can not be regarded as a part of the record. *Sohn v. Marion, etc., G. R. Co.*, 73 Ind. 77.

As exceptions to the instructions asked by the appellant were not otherwise saved, the questions sought to be presented by them and by the rulings of the court on the admission and exclusion of testimony do not arise.

Exceptions to the instructions given by the court, however, were saved in pursuance of the provisions of sections 324 and 325 of the code of 1852, and the question arising upon these instructions will be considered.

The court gave numerous instructions, to each of which an exception was taken; but appellant, in its brief, only insists that the court erred in instructing the jury that they might consider the opinions of witnesses as to the value of the land immediately before the appropriation, and the value of the several parcels immediately after the appropriation, for the purpose of determining the damages sustained by the appropriation.

The court, after informing the jury that a witness was not permitted to express his opinion as to the amount of damages sustained by the appropriation, said: "You will not understand, however, from what I have said, that opinions of witnesses are incompetent for any purpose. The opinions of

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witnesses are competent, and have been admitted in this case, as to the value of plaintiff's farm as a whole *before* the location of defendant's railroad thereon, and as to the value of the strip taken for the right of way, and as to the value of the separate parcels constituting the residue left after the location of the railroad, and as to the buildings and orchard thereon. Upon these subjects it was competent for the witnesses to state their opinions and their reasons for them, and you have a right, and it is your duty, carefully to consider and weigh such opinions, and the reasons for them, in connection with the other testimony introduced, although you are not bound to adopt the opinion of any one of such witnesses, or his reasons for it."

This is the only instruction bearing upon this question, and we are of opinion that it was not erroneous. In the case of *Frankfort, etc., R. R. Co. v. Windsor*, 51 Ind. 238, the court permitted witnesses, who were acquainted with the property, to express their opinions as to the value of the fractions into which the appellee's land had been cut by the railroad, and this ruling was approved by this court. If proper to receive the opinion of witnesses as to the value of the fractions, it is also proper to receive such opinions as to the value of the whole, and if proper to receive them at all, it is, of course, proper for the jury to consider them as they were directed to do in this case. The value of the land as a whole, and the value of the different parcels, were facts which the jury were authorized to consider, and these facts would doubtless aid them in reaching a correct conclusion. It is not, of course, the only mode of showing the amount of damages sustained by the location of a railroad, but these facts are clearly competent for such purpose. Nor does the direction given in this case contravene the rule announced in the cases of *Baltimore, etc., R. W. Co. v. Johnson*, 59 Ind. 480, and *Baltimore, etc., R. W. Co. v. Stoner*, 59 Ind. 579. In these cases the witnesses were allowed to express opinions, in an indirect way, as to the amount of damages sustained; while in this case the jury was directed to

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consider the opinion of witnesses only as to the value of the property involved, either as a whole or in parcels. This was right, as the opinion of witnesses qualified to speak as to the value of property is clearly admissible for the purpose of determining such fact, and the fact itself may properly be considered in fixing the damages sustained by an appropriation of the land. There was, as we think, no error in giving the instruction, and as there is no error in the record, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

 No. 9241.

ALLEN ET AL. v. FRAZEE.

PROMISSORY NOTE.—*Consideration.*—*Fraud.*—*Answer.*—*Reply.*—*Estoppel.*—

When fraud, in respect to the consideration, is pleaded to an action upon a note, it is not a good reply that when the plaintiff was about to purchase the note, the defendant, in answer to an inquiry, said "all right," it not appearing that the defendant then knew of the fraud.

PLEADING.—*Facts and Evidence.*—A pleading should state the issuable facts, and not merely evidentiary facts.

CONTRACT.—*Champerty.*—*Vendor and Vendee of Land Joining in Defence Against Foreclosure of Mortgage.*—A contract is not champertous, whereby the vendor and vendee of land agree to join in defending an action against them both for the foreclosure of a mortgage upon the land, and to share the benefits of the defence if successful.

Quere, whether or not in any case, a meritorious defence to an action can or ought to be defeated by a reply that it is made under a champertous agreement between the defendant and another.

From the Rush Circuit Court.

W. A. Cullen, B. L. Smith and C. Cambern, for appellants.

G. C. Clark, J. J. Spann and J. Q. Thomas, for appellee.

85	283
122	405
86	283
144	72

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WOODS, C. J.—The appellant Ephraim T. Allen made his promissory notes for the aggregate sum of \$1,575 to Green Bros., and, to secure the payment of the same, executed a mortgage upon certain real estate, which he afterwards conveyed to his co-appellants Porter and Gartin; Green Bros. endorsed the notes to the appellee, who brought this action against Allen and his grantees, praying judgment upon the notes, and a decree for foreclosure of the mortgage.

Allen answered by several pleas, whose sufficiency is not questioned, alleging fraud in respect to the consideration of the notes. To these pleas the appellee filed a replication in seven paragraphs, to the fifth, sixth and seventh of which Allen demurred for want of facts, and now insists that the court erred in overruling the demurrers.

In the fifth and sixth paragraphs each are alleged matters in the nature of an estoppel *in pais*, to the effect that having been informed by the appellee that he was about to purchase the notes, Allen said "all right," and gave no notice of having any defence. Each of these paragraphs is fatally defective for this, if for no other reason, that it does not show that Allen, at the time referred to, had knowledge of the frauds which are alleged in his answer. Circumstances are alleged which, in some degree, tend to show that he ought reasonably to have discovered the fraud, if, in fact, it had been perpetrated as alleged; but it is not good pleading to set forth evidence; the fact itself must be alleged, unless the circumstances set forth are conclusive of the fact, which is not so in this case.

In the seventh paragraph it is alleged that the pretended defences are made under a corrupt and champertous bargain between Allen and his co-defendants Porter and Gartin, by the terms of which the suit is to be carried on at their joint expense, and Allen is to have the benefit of one-half of the amount that shall be recouped from the notes sued on, and Porter and Gartin are to have the benefit of the other half thereof.

Besides overruling the demurrer to this pleading, the court,

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on the trial, directed the jury to return a verdict for the appellee, in disregard of the defences pleaded. This direction was based upon, and is claimed to have been justified by, a written agreement between Allen and his co-defendants, which was put in evidence. That agreement shows the terms upon which the property was sold and conveyed by Allen to Porter and Gartin, and contains the following clause: "*Fourth.* To pay such sum as may be due, or found due, on a settlement, compromise, or litigation of a certain mortgage held by Benjamin Frazee, the face of which is \$1,960; and it is agreed that for whatever sum said debt is settled less than the face, the parties to the contract are to divide; that is to say, the said Porter and Gartin are to pay the said Allen the one-half of whatever may be rebated, recouped or set off against said claim."

Conceding the reply to be good, it is clear that the proof did not support it, and the court was not justified in taking the case from the jury. We are, however, of opinion that the reply is not good. The rigorous rules of the common law in reference to champertous contracts have never been enforced in this State, *Stotsenburg v. Marks*, 79 Ind. 193; and under the code they probably can have still less application. It is said in *Greenman v. Cohee*, 61 Ind. 201, that "Champertous contracts may be brought before the court in two or more ways, viz.: by being the foundation of a suit, perhaps of a defence. In such cases the question upon them arises between the parties to them, and they are held void;" and it is held in that case that if the action is being prosecuted under a champertous contract, and the fact is brought to the attention of the court, the court may at once dismiss the action. But our attention has been called to no case, and it certainly has never been held in this State, that the plaintiff may reply to a meritorious defence to his cause of action, that the defendant is making his defence under a champertous agreement to share the benefits of success with another. The contract might be void as between the parties to it, as was held in *Quigley v. Thomp-*

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son, 53 Ind. 317, *Scobey v. Ross*, 13 Ind. 117, and other cases; but why, in an action upon an unjust claim, the plaintiff should be allowed to avail himself of an unlawful agreement between defendants to the action, it is difficult to see. But, passing this question by and conceding that under some circumstances the alleged defence might be so tainted with champerty or maintenance as not to be permissible, no such state of facts is shown in this case. The alleged agreement was not between a defendant to the action and a stranger, but between co-defendants. It appears in the complaint that Porter and Gartin had bought the property of the mortgagor, their co-defendant, but it is not alleged in the complaint, nor shown in any of the pleadings, that they had assumed the payment of the mortgage debt, or had purchased subject thereto; so that it does not appear but that they were vitally interested in making a good defence to the action. They were made defendants with Allen to the complaint, and consequently with him had a right to make all defences which were possible; and, this being so, they had a right, as against the plaintiff, to make such agreement as they chose for sharing with Allen the expenses and benefits of the litigation.

Judgment reversed, with instructions to sustain the demurrer to the fifth, sixth and seventh paragraphs of reply.

No. 8924.

HECKELMAN ET AL. v. RUPP.

SUPREME COURT.—*Brief of Appellant.*—*Rule 14.*—*Dismissal of Appeal.*—Rule 14 of the rules of the Supreme Court gives the appellant sixty days after the submission of the cause in which to file his brief, and provides that, if such brief is not filed within the time limited, the appeal shall be dismissed; but the rule is complied with by a brief stating clearly points relied upon, and this will not preclude appellant from afterwards filing a more elaborate brief.

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FRAUDULENT CONVEYANCE.—*Real or Personal Property.*—*Complaint.*—*Exhibits.*—In a suit by a creditor to set aside the conveyance of real estate, or the written transfer of personal property, as fraudulent against the grantor's creditors, neither the conveyance nor the bill of sale is the foundation of the creditor's cause of action; and, therefore, it is not necessary to the sufficiency of the complaint, upon a demurrer thereto for the want of facts, that a copy of the conveyance or bill of sale should be made an exhibit or filed with the complaint.

PRACTICE.—*Verdict.*—*Venire de Novo.*—A *venire de novo* will not be granted, where the verdict of the jury finds the substance of the issues, and is free from uncertainty or ambiguity, and is not so defective as to prevent the rendition of judgment thereon.

SAME.—*Cause for New Trial.*—*Bill of Exceptions.*—*Supreme Court.*—The statements in a motion for a new trial, as causes therefor, are not regarded as true by the Supreme Court, unless their truth is shown by a bill of exceptions properly in the record.

SAME.—*Instruction of Court.*—*Assumption of Facts.*—An instruction of the court to the jury, which assumes the truth of facts in issue between the parties, is erroneous.

From the Harrison Circuit Court.

B. P. Douglass and *S. M. Stockslager*, for appellants.

W. T. Zenor, *N. R. Peckinpagh* and *S. J. Wright*, for appellee.

Howk, J.—The appellee sued the appellants, in a complaint of two paragraphs. The object of the suit was to obtain a judgment, declaring certain conveyances of real and personal estate, executed by the appellants George P. and Jannetta Heckelman, fraudulent and void as against their creditors, and subjecting the property therein described to sale for the payment of their debts to the appellee. The grantees in said conveyances, Jacob P. and William Heckelman, were made defendants to the action. The cause was put at issue and tried by a jury, and a general verdict was returned, in substance, as follows: "We, the jury, find for the plaintiff, that the conveyances of real estate and transfer of personal property by the defendants George P. Heckelman and Jannetta Heckelman, to their co-defendants, Jacob Paul and William Heckelman, mentioned in plaintiff's complaint, were fraudulent as against plaintiff, and ought to be set aside and annulled,

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and that the property, so conveyed and transferred, be subjected to the payment of the plaintiff's claims, in the complaint mentioned.

(Signed) "WILLIAM K. BRUNER, Foreman."

Over the appellants' motions for a *venire de novo*, for a new trial and in arrest of judgment, and their exceptions saved, the court rendered judgment for the appellee, on the general verdict.

The following decisions of the circuit court are assigned as errors by the appellants:

1. In overruling their separate and several demurrers to the first and second paragraphs of appellee's complaint;
2. In overruling their motion for a *venire de novo*;
3. In overruling their motion for a new trial; and,
4. In overruling their motion in arrest of judgment.

Appellee has moved this court in writing to dismiss the appeal in this case, for the reason that the appellants have failed to comply with that provision of Rule 14 of the rules of this court, which required them to file a brief within sixty days after the submission of the cause. The records of this court and the files in this case show, that the appeal was taken by filing a certified transcript of the record below, in the office of the clerk of this court, on the 12th day of August, 1880. On the same day the appellants filed their brief in the case; and thereafter, on the 24th day of November, 1880, the cause was submitted by agreement. It is claimed by appellee's counsel, that the brief so filed by appellants, before the submission of the case, was merely "a brief to procure a writ of *supersedeas*," and, therefore, should "not be considered a compliance with the rule or justify them in their laches." It seems to us, however, that the brief so filed by appellants was a sufficient compliance with the requirements of Rule 14 to prevent the dismissal of the appeal, either by the clerk under the rule, or by the court on appellee's motion. It was not a very elaborate brief, it is true, but in it the appellants stated the points, upon which they relied for the reversal of the judg-

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ment, so clearly and distinctly that it would have been the duty of this court to consider and decide them, even if they had filed no additional brief. They did, however, file such additional brief on the 6th day of October, 1881, and some time before the court was ready to consider and pass upon the case in its order. In *Murray v. Williamson*, 79 Ind. 287, upon the point now under consideration, it was said: "The rule is easily complied with. A brief filed in compliance with it does not prevent the appellant from afterwards filing a more extended or elaborate one, if he wishes to do so."

The appellee's motion to dismiss the appeal in this case is overruled.

In the first paragraph of his complaint the appellee alleged in substance, that the appellants George P. and Jannetta Heckelman, on the — day of —, 1879, and long prior thereto, were and had been largely indebted to appellee, by their promissory notes, in about the sum of \$600, and the interest accrued thereon; that afterwards, on October 1st, 1879, in the court below, the appellee obtained two judgments against the said George P. and Jannetta Heckelman jointly, one for the sum of \$173.75 and the other for \$294.20, and another judgment against the said George P. Heckelman alone for the sum of \$243.50; that afterwards, on October 30th, 1879, the appellee sued out executions on his said several judgments, directed and delivered to the sheriff of Harrison county; and that afterwards, on November 21st, 1879, the sheriff of said county made his return of the several executions, to the effect that, after demand of payment thereof or property thereon, and the refusal of either, he made diligent search for property of the judgment defendants, and each of them, and, finding no property on which to levy the several executions, within his bailiwick, he returned the same accordingly, *nulla bona*; and that each of the judgments remained in full force, and had not been paid or satisfied, nor any part thereof.

The appellee further averred that at the time of the execu-

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tion of the several promissory notes, on which he obtained the several judgments aforesaid, and for a long time thereafter, the appellant George P. Heckelman was the owner of a large amount of real estate in Harrison county, Indiana, to wit: Lot No. 18, in the town of New Middletown, of the probable value of \$500; also four acres of land, particularly described, and another parcel of real estate, described by metes and bounds, with the appurtenances, including the saw-mill and machinery situate thereon, of the probable value of \$700; that appellant George P. Heckelman was also the owner of a large amount of personal property, to wit: four head of mules, one log-wagon, one spring-wagon, one two-horse wagon, and four sets of harness; that the appellants George P. and Jannetta Heckelman, fraudulently intending to wrong, cheat and delay the appellee in the collection of his said debts against them, as well as their other creditors, did, on the 19th day of September, 1879, fraudulently dispose of and convey the whole of said real estate and transfer said personal property to their sons and co-appellants, Jacob P. and William Heckelman, without any consideration therefor, who took and received said conveyance of real estate and transfer of personal property, with full knowledge of the fraudulent intent and purpose of said grantors to cheat and defraud the appellee, not leaving enough property to satisfy the appellee's debt, or any part thereof; and that, ever since said conveyance, he had remained wholly insolvent; that the first described real estate was conveyed by the separate deed of George P. and Jannetta Heckelman to their co-appellant William Heckelman, and the second described tracts of real estate, together with said personal property, were sold and conveyed to their co-appellant Jacob P. Heckelman; that all of said property was sold and disposed of while the appellants George P. and Jannetta Heckelman owed and were indebted to the appellee as aforesaid, and while suits were pending against them for his said debts. Wherefore, etc.

The second paragraph of the complaint states substantially

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the same facts as are stated in the first paragraph, except in this, that it is not alleged in the second paragraph, as in the first, that the conveyances of real estate and transfer of personal property by George P. and Jannetta Heckelman to their sons and co-appellants, William and Jacob P. Heckelman, were made and executed without any consideration whatever therefor.

The only objection urged by the appellants' counsel to either paragraph of the complaint is this, that the appellee did not file with, nor make part of, either paragraph the conveyances of real estate and transfer of personal property therein mentioned, or copies thereof. We do not think it was necessary that the conveyances of the real estate, or the transfer of the personal property, if such transfer was in writing, should be made parts of either paragraph of the complaint, in any manner, or filed therewith. The conveyances and transfer were not the foundation of appellee's cause of action, as stated in either paragraph of his complaint, in any such sense as would require that those instruments, or copies thereof should be filed with or in any manner made parts of the complaint. The gravamen of appellee's complaint, as set forth in each paragraph thereof, was not the conveyances of the real estate or the transfer of the personal property therein mentioned, but it was the alleged fraud of the appellants in and about the execution of those instruments. This alleged fraud, and not the conveyances or transfer, was the foundation of appellee's suit; and the code only requires that the original instrument, or a copy thereof, should be filed with the pleading, when the pleading is founded on such instrument. Code of 1852, sec. 78; sec. 362, R. S. 1881; *Bray v. Hussey*, 24 Ind. 228; *Heitman v. Schnek*, 40 Ind. 93. The demurrer to each paragraph of the complaint was correctly overruled.

Appellants' counsel earnestly insist, that the trial court erred in overruling the motion for a *venire de novo*. This motion was in writing, and two causes were assigned therefor; namely: 1. That the verdict is uncertain and ambiguous; and,

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2. That the verdict finds less than the whole matter put in issue. We have heretofore given, in this opinion, an exact copy of the verdict, and it will be seen therefrom, we think, that the verdict contains no general finding in favor of the appellee; but the verdict finds, that the conveyances of real estate and transfer of personal property, mentioned in appellee's complaint, were fraudulent as against appellee, and ought to be set aside and annulled, and the property, so conveyed and transferred, be subjected to the payment of appellee's claims, in his complaint mentioned. This was substantially the relief prayed for by appellee in each paragraph of his complaint. While the facts alleged were not found in detail by the jury, yet the verdict finds the substance of the issues, namely, the fraud of the appellants in and about the conveyances and transfer of the real and personal property, in the appellee's favor. There is no uncertainty or ambiguity in the verdict; and, upon the facts found by the jury in appellee's favor, it seems to us that he is entitled to judgment in accordance with the prayer of his complaint. To authorize the issue of a *venire de novo*, the verdict must be so defective that judgment can not be rendered upon it. *Henderson v. Dickey*, 76 Ind. 264, and authorities cited. For the reasons given, the court did not err, we think, in overruling the motion for a *venire de novo*.

In their motion for a new trial, the appellants assigned, as causes therefor, certain alleged errors of law occurring at the trial, and excepted to, in refusing to allow certain witnesses to answer certain questions propounded to them. These causes for a new trial were not shown to be true by any bill of exceptions appearing in the record. In this court, the statements in a motion for a new trial are not regarded as true unless their truth is shown by a bill of exceptions properly in the record. *Wiler v. Manley*, 51 Ind. 169; *Graeter v. Williams*, 55 Ind. 461; *Hyatt v. Clements*, 65 Ind. 12. The action of the court, complained of as erroneous, is not shown by the record, and presents no question for our decision.

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The instructions of the court to the jury were made part of the record by an order of the court. The appellants' counsel complain in argument of the following instruction, given at the appellee's request :

"5. The fact that a suit is pending, at the time of a conveyance by the grantor of his property, against him, of which his grantees have knowledge, for a debt which said grantor owes, and the further circumstance that no change was made in the possession of the property, after the deeds were made, are badges of fraud that it is proper for you to consider, in connection with all the other proof, in determining the question of the fraudulent intent of the parties, and as affecting the good faith of the transaction."

This instruction was erroneous. It assumes the truth of alleged facts and circumstances which were denied by the appellants and in issue between the parties ; and it told the jury that these assumed facts and circumstances were badges of fraud, to be considered by them as such in determining the question of the fraudulent intent of the appellants, and as affecting the good faith of the transaction. The facts and circumstances of the case are to be found by the jury from the evidence, and are not to be assumed as true in the instructions, even though the court may believe them to be true. Besides, the instruction did not state the law correctly, in any view of the case.

Other instructions are complained of, on the same ground, and seem to us to be as objectionable as the one quoted, and for the same reason.

For error in the instructions of the court, a new trial ought to have been granted.

The judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

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No. 8826.

WOLFORD v. POWERS, ADMINISTRATRIX.

CONTRACT.—Consideration.—As a rule, where there is no fraud and a party receives all the consideration he contracted for, the contract will not be set aside for want or failure of consideration.

SAME.—Right of Parties to Determine Consideration.—Where the value of the consideration for a contract is indefinite, the parties have a right to determine it for themselves, and courts ought not to overturn their decision upon its sufficiency.

SAME.—Where one contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of the value should, in the absence of fraud, be left undisturbed.

SAME.—Promissory Note.—Consideration.—A promissory note executed in consideration of a parent naming a child for the maker of the note, and in pursuance of a promise made him that if the child were so named he would provide generously for its education and support in life, is based upon a sufficient consideration.

SAME.—Continuous and Executed Consideration.—Request.—An executed consideration will not support a promise, nor will voluntary services rendered as a mere favor or gratuity constitute a valuable consideration for a promise; but where there is a request, and continuous services of value are rendered to the person making the request, the consideration is a valid one, and will support a promise to pay for such services, although some of them were rendered prior to the request.

From the Allen Circuit Court.

W. G. Colerick, H. Colerick, R. Stratton, R. S. Taylor and S. L. Morris, for appellant.

J. Morris, L. M. Ninde and T. E. Ellison, for appellee.

ELLIOTT, J.—The appellant's complaint is founded upon a promissory note executed by the appellee's intestate. The answer of the appellee alleges that the only consideration for the note sued on was the sum of \$40 paid to the intestate by the appellant, and the agreement of the latter to bestow upon one of his children the name of Charles Lehman Wolford. The appellant replied to this answer that Charles Lehman, the intestate, had been an intimate friend of the appellant, and a frequent visitor at his house; that Lehman was a

85	294
127	489

85	294
131	298

85	294
141	306

85	294
148	98

85	294
160	299

85	294
171	343

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widower, about eighty-seven years of age ; that he had been the father of one boy who had died many years before the execution of the note ; that his only relatives were three aged sisters ; that such relations of friendship existed between appellant's family and the intestate that he spent a great part of his time at the former's house ; that, on the 18th day of April, 1878, a male child was born to appellant ; that, a few weeks after the birth of the child, Lehman requested that it should be given the name of Charles Lehman Wolford ; that if that name should be given it he would make its welfare his chief object in life, "and provide for it generously, and give it a good education ;" that, in consideration of such promise, the appellant did name the child Charles Lehman, which name it still bears ; that it was afterwards agreed that as soon as suitable arrangements could be made, Lehman should become a member of appellant's family ; that he had frequently visited appellant's house, and was on several occasions ill for a brief period while there, and was, at his request, cared for and supplied with simple remedies by appellant's wife ; that, on several occasions, appellant, at Lehman's request, hired a carriage and took him out driving ; that, in September, 1878, the decedent proposed to the appellant that he would, in fulfilment of his promise to provide generously for the education of his namesake and give him a start in life, and in consideration also of the services rendered to him by the appellant and his wife, execute to him his note for \$10,000, stating at the same time that he preferred to give effect to his intention toward and agreement with appellant and his child in that manner, rather than by the execution of a will or the conveyance of property ; that appellant, being ignorant of the law, and supposing that a promissory note would not be valid without a money consideration, stated to the decedent that he feared that a note executed in the manner proposed would not be binding ; that the decedent proposed that appellant should pay him a sum of money for the express purpose of creating a legal consideration for the note, in case the other considera-

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tion should be insufficient in law; that appellant assented, and thereupon paid the decedent \$40; "that the note was executed in consideration of the naming of the child Charles Lehman, and of the promise theretofore made by the decedent, that if the child were so named he would provide generously for its education and give it a start in the world, and of the services rendered by the appellant and his wife, and of the sum of \$40 paid by him to the decedent." The reply also states that "the personal services rendered by the appellant were of no great pecuniary value, and were rendered without any express agreement to pay for them, but that it was, nevertheless, the intention of the decedent to compensate the appellant, and to do so upon a large and generous scale, far exceeding their intrinsic value, and so as to correspond with the estimate of their value to him; and for that purpose, and upon that consideration, with the other considerations, he executed the note sued on."

To this reply a demurrer was sustained. It is the general rule that where there is no fraud, and a party gets all the consideration he contracts for, the contract will be upheld. In *Hardesty v. Smith*, 3 Ind. 39, it was said: "When a party gets all the consideration he honestly contracted for, he can not say that he gets no consideration, or that it has failed. If this doctrine be not correct then it is not true that parties are at liberty to make their own contracts." The same principle is declared and enforced in many of our own cases. *Kernodde v. Hunt*, 4 Blackf. 57; *Harvey v. Dakin*, 12 Ind. 481; *Baker v. Roberts*, 14 Ind. 552; *Taylor v. Huff*, 7 Ind. 680; *Louden v. Birt*, 4 Ind. 566; *Smock v. Pierson*, 68 Ind. 405 (34 Am. R. 269); *Neidefer v. Chastain*, 71 Ind. 363 (36 Am. R. 198); *Williamson v. Hitner*, 79 Ind. 233. In Pollock's *Principles of Contract*, the author quotes approvingly from a philosophic treatise this statement: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give." An examination of the decided cases will prove this to

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be an unusually accurate statement of the law. In the case of *Sturlyn v. Albany*, 1 Cro. Eliz. 67, it was held that where the defendant promised the plaintiff that if he would show him a lease he would pay him a certain sum, and the contract was held valid. The report of the decision reads thus: "But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action." It is laid down in an old book that, "If A, in consideration that B will deliver to him a recognizance to read over, assumes and promises within six days to re-deliver the same to B, or to pay him £1,000; this is a good promise, upon which B may have an action against A, for the consideration is sufficient." 1 Bacon's Abridgment, 420. In *Bainbridge v. Firmstone*, 8 A. & E. 743, the defendant promised the plaintiff that if he would allow him, the defendant, to weigh certain boilers, he would return them within a reasonable time, and the consideration was held sufficient, Lord DENMAN saying: "The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not enquire what benefit he expected to derive." In *Haigh v. Brooks*, 10 A. & E. 309, Lord DENMAN said, in speaking of the sufficiency of the consideration of a contract: "Both" (of the parties) "being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It can not be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge." This case came up on appeal, and Lord ABINGER, C. B., speaking for the court, said: "The actual surrender of the possession of the paper to the defendant was a sufficient consideration, without reference to its contents." *Brooks v. Haigh*, 10 A. & E. 323, 334. In the argument the case of *Wilkinson*

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v. *Oliveira*, 1 Bing. N C. 490, was cited, wherein it was held that the surrender of a letter would support a promise to pay £1,000. Turning from the English to the American courts, we find many illustrations of the principle under discussion. In *Hempler v. Schneider*, 17 Mo. 258, the consideration for the promise was the agreement that a third person should return to St. Louis within fifty days; and it was held sufficient, the court saying: "This court is not aware of any law, which would justify it in releasing men from their lawful contracts, unless in cases of fraud, imposition, accident, or mistake in their creation. The plaintiff may have sustained no damages in consequence of Nauman not having returned in fifty days, but there was a sufficient consideration for his undertaking, and he must abide the consequences of his own bargain deliberately entered into." In *Train v. Gold*, 5 Pick. 380, it is said: "So if A promises B to pay him a certain sum of money, if he will call for it at a particular time, and B calls accordingly, the promise is binding, the calling for the money being a sufficient consideration. For any gain to the promisor or loss to the promisee, however trifling, is a sufficient consideration to support an express promise." The Supreme Court of South Carolina said: "Every man was free to make a contract, and free to refuse it; but when once made, he was bound by it, where there was no fraud, concealment or latent defect. * *

* * Inadequacy of consideration is not alone any ground for setting aside a contract solemnly entered into." *Whitefield v. McLeod*, 1 Am. Dec. 650. In *Barnum v. Barnum*, 8 Conn. 469 (21 Am. Dec. 689), the defendant bought a lottery ticket which, at the time, was utterly worthless; and he was held liable on the note executed for it. The court referred to the case of the *Earl of March v. Pigot*, 5 Burr. 2802, where two young men made a bet as to which should first come to his estate. The notes executed by the young men ran as follows: "I promise to pay to the Earl of March 500 guineas if my father dies before Sir William Codrington." The other read thus: "I promise to pay to Mr. Pigot 1,600 guineas, in case

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Sir William Codrington does not survive Mr. Pigot's father." At the time the bet was made Pigot's father was dead, and yet Lord MANSFIELD held that there was a valid consideration for the note.

In *Earl v. Peck*, 64 N. Y. 596, a case similar to this in many respects, the court says: "The only point insisted upon in this court, relates to the consideration. The note is for \$10,000, and expresses the consideration to be for services rendered. The plaintiff had been the housekeeper for the defendant, who was a bachelor, for seven or eight years, and the latter was indebted to her for her services in some amount, and the evidence tended to prove that at some time during the service it was agreed that the amount of compensation should be left to the intestate. Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud, or undue influence, is not a defence to a note. It is not necessary that the consideration of a note shall be equal in pecuniary value to the obligation incurred. If no part of the consideration was wanting at the time, and no part of it subsequently failed, although inadequate in amount, the note is a valid obligation. * * * * * There is no standard whereby courts can limit the measure of value in such a case, and an obligation is not wanting even partially in consideration, because the value is less than the obligation."

The case before us, in some of its features, resembles that of *Cowee v. Cornell*, 75 N. Y. 91 (31 Am. R. 428), where a note for services was sustained although the amount was \$20,000, and greatly in excess of the value of the services. The court said: "Mere inadequacy in value of the thing bought or paid for is never intended by the legal expression, want or failure of consideration. This only covers either total worthlessness to all parties or subsequent destruction partial or complete." The case of *Lindell v. Rokes*, 60 Mo. 249; S. C., 21 Am. R. 395, is a peculiar one. There the consideration of the note sued on was the payee's promise to abstain from the use of intoxicating liquors for eight months; and it was held to be sufficient

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to support the note. In *Parks v. Francis's Adm'r*, 50 Vt. 626 ; S. C., 28 Am. R. 517, the consideration of the promise was the agreement of the father to name his son Nathan Francis Parks, and the court seems to have treated this as a valid consideration, although the point is not expressly decided, as the case went off upon a question whether the oral contract was within the statute of frauds. There are very many American cases illustrating the principle we are considering, and treating as valid all sorts of considerations, among them : *Crow v. Harmon*, 25 Mo. 417 ; *Johnson v. Titus*, 2 Hill, 606 ; *Oakley v. Boorman*, 21 Wend. 588 ; *Sawyer v. McLouth*, 46 Barb. 350 ; *Hurd v. Green*, 17 Hun, 327 ; *King's Ex'rs v. Hanna*, 9 B. Monroe, 369 ; *Seymour v. Delancey*, 6 Johns. Ch. 222 ; *Brooks v. Ball*, 18 Johns. 337 ; *Sanborn v. French*, 2 Fost. N. H. 246.

Before passing from this branch of the case, there is an English decision which we think deserves attention ; the case to which we refer is that of *Shadwell v. Shadwell*, 30 Law J. 145. In that case the decedent wrote the following letter to his nephew : " I am glad to hear of your intended marriage with Ellen Nicholl ; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life, and until your annual income derived from your profession of a chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require." The declaration averred that the nephew relied upon this promise, and married the woman named in the letter. ERLE, C. J., in delivering the opinion of the court, said : " Then, do these facts shew that the promise was in consideration, either of the loss to be sustained by the plaintiff, or the benefit to be derived from the plaintiff to the uncle, at his, the uncle's, request ? My answer is in the affirmative. First, do these facts shew a loss sustained by the plaintiff at the uncle's request ? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss ; yet, as between the

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plaintiff and the party promising an income to support the marriage, it may be a loss. * * * * * Secondly, do these facts shew a benefit derived from the plaintiff to the uncle at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the *status* of the nephew which the uncle declares."

There are, it is commonly but not altogether accurately said, two exceptions to the general rule we have stated:

First. Where the sole consideration is money, and the amount is greatly disproportioned to the value of the promise.

Second. Where the consideration is so grossly disproportionate to the value of the promise as to indicate fraud, shock the conscience of the court, and make the enforcement of the contract unconscionable.

Of these in their order.

First. A money consideration is capable of exact and definite admeasurement; its value is fixed and unalterable, and there can not be any uncertainty as to its adequacy or inadequacy. The parties really exercise no judgment in passing upon its value, for that never is in doubt. Courts can, therefore, pass upon its sufficiency without infringing the rule that where the parties have for themselves determined the sufficiency of the consideration, courts will not review their decision. *Schnell v. Nell*, 17 Ind. 29; *Shepard v. Rhodes*, 7 R. I. 470. But where the consideration is something else than money, there must be some exercise of judgment in ascertaining and settling its value.

Second. Where the consideration is so grossly inadequate as to shock the conscience, courts will interfere, although there has been some exercise of judgment by the parties in fixing it. But it will be found upon an analysis of the cases, that courts interfere upon the ground of fraud, and not upon the ground of inadequacy of consideration. The courts never do interfere, unless the consideration is so grossly inadequate as to amount to fraud or oppression. Mr. Pomeroy has given the subject

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careful investigation, and concludes his discussion with this remark: "Even then fraud, and not inadequacy of price, is the true and only cause for the interposition of equity and the granting of relief." 2 Pomeroy Eq. Jur., section 927. Judge Story is still more emphatic in his statement of the rule. "Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in equity. For courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, and profitable or unprofitable, or otherwise, are considerations, not for courts of justice, but for the party himself to deliberate upon. Inadequacy of consideration is not, then, of itself, a distinct principle of relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle." 1 Story Eq. Juris., sections 244, 245. In *Griffith v. Spratley*, 1 Cox C. C. 383, the Chief Baron said there was no case in which mere inadequacy of price, independent of other considerations, had been held sufficient to set aside a conveyance. In *Woodfolk v. Blount*, 3 Haywood, 146; S. C., 9 Am. Dec. 736, the Supreme Court of Tennessee made the same declaration. The case of *Harrison v. Guest*, 8 H. L. C. 481, was ably argued, and it was held, Lord Chancellor CAMPBELL, and Lords BROUGHAM, WENSLEYDALE and CRANWORTH, all giving opinions, that mere inadequacy of consideration would not invalidate a contract. Lord WENSLEYDALE said: "My Lords, I entirely agree with the opinion of my noble and learned friend on the Woolsack; I concur entirely in all the observations that he has made upon this case; I do not feel the least doubt about it." The case cited was very like the present, and is strong authority upon this point.

The question in the case at bar, therefore, comes to this:

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Did Wolford perpetrate a fraud upon Charles Lehman? If, upon the facts stated in the answer and reply, we can justly declare that the former was guilty of fraud, actual or constructive, then we can sustain the judgment; otherwise we must reverse it.

The character of the consideration is an important matter; for there is, as we have seen, a marked and clear distinction between a determinate money consideration and an indeterminate one. This distinction is pointed out in *Schnell v. Nell*, *supra*, and in *Smock v. Pierson*, *supra*. In this last case it was said: "In estimating the value of a thing as the consideration for a promise, there is a manifest distinction between property of a certain and determinate value, and things which have but a contingent and indeterminate value. But, in any event, mere inadequacy of consideration is not sufficient to defeat a promise." In *Kerr v. Lucas*, 1 Allen, 279, it was held that where the value of a consideration is indefinite, the parties have a right to fix it for themselves, and the courts can not overturn their decision upon its sufficiency. The consideration in the case before us was, except as to the \$40 paid in money, an indeterminate one, and one which the parties alone were competent to measure and determine.

Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should be left undisturbed, unless, indeed, there is evidence of fraud. There is, in such a case, absolutely no rule by which the courts can be guided, if once they depart from the value fixed by the promisor. If they attempt to fix some standard, it must necessarily be an arbitrary one, and ascertained only by mere conjecture. If, in the class of cases under mention, there is any legal consideration for a promise, it must be sufficient for the one made; for, if this be not so, then the result is that the court substitutes its own judgment for that of the promisor, and, in doing this, makes a new contract. Where the purpose of the party is to secure

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a pecuniary or property benefit, there is much more ground for judicial interference than in a case like this, where the controlling purpose is not gain, but the gratification of a desire or fancy. Even in the former class of cases, courts never do interfere upon the sole ground of inadequacy of consideration, and certainly should not in the class to which the one at bar belongs. No person in the world, other than the promisor, can estimate the value of an act which arouses his gratitude, gratifies his ambition, or pleases his fancy. If there be any consideration at all, it must be allotted the value the parties have placed upon it, or a conjectural estimate, made arbitrarily and without the semblance of a guide, must be substituted by the courts.

We turn now to the cases cited by the appellee. Three of them, *Jestons v. Brooke*, Cowp. 793, *Floyer v. Edwards*, Cowp. 116, and *Baxter v. Wales*, 12 Mass. 365, are the same in principle, and decide that a creditor can not fix an oppressive and unconscionable sum as the measure of damages for a breach of contract. They do not proceed upon the ground of inadequacy of consideration, but upon the ground that a penalty for failure to perform a contract must not be oppressive. It may well be doubted whether they do not state the rule too broadly upon that point; for, where the damages are indefinite and uncertain, the parties may fix a certain sum as liquidated damages, and the contract will be enforced. But we need not and do not make any decision upon this point. The case of *Ex parte Young*, 6 Bissell, 53, turned upon the validity of "corner option contracts in grain," and the question as to the sufficiency of the consideration was really not discussed or decided by the court. In the case of *Cutler v. How*, 8 Mass. 257, there was no consideration at all for the part of the note held invalid, for the reason that no fees were due the officer. The cases of *Schnell v. Nell* and *Shepard v. Rhodes* decide that where the consideration is money and nothing else, courts may determine its adequacy; but they both declare that where the consideration is an indeterminate one, the rule is other-

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wise. In *Shepard v. Rhodes* it was said: "In all cases, therefore, where the *assumption* or undertaking is founded upon the sale or exchange of merchandise or property, or upon *other than a money* consideration, and the promise has been deliberately made, the law looks no further than to see that the obligation rests upon *a* consideration, that is, one recognized as legal, and of *some* value." We may remark, in passing, that the doctrine, that where money is the sole consideration the courts will interfere upon the ground of inadequacy, is denied by high authority. *Lawrence v. McCalmont*, 2 How. 426.

We do not agree with appellee's counsel that where the consideration is partly in money and partly in something else, we must, in determining whether the consideration was adequate, exclude the money part. We suppose that if a man sells a horse for a patent hay-fork and for \$40 in money, the two things must be reckoned together. But, perhaps, the general rule may not apply to a case like this, where it is made to appear that the payment of the money was little else than a mere matter of form, and that the real consideration for the promise was something other than the money. Without, however, deciding this point, we shall treat the case as resting entirely upon the two other considerations stated in the pleadings.

There are two distinct considerations stated in the reply. The first of these, the performance of services for the intestate, is, in our opinion, a legal consideration. We are not unmindful of the rule that an executed consideration will not support a promise; on the contrary, we fully approve it, and carefully refrain from encroaching upon it. Nor do we hold, or mean to hold, that a voluntary service rendered as a mere favor or gratuity can constitute a valuable consideration for a promise. We do hold that the pleadings in this case show that the consideration was not an executed one, and that the services were not rendered voluntarily, or as a mere matter of favor. We rest our ruling upon the fact that the services

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were continuous and rendered at the request of the maker of the note. In *Osborne v. Rogers*, 1 Saunders, 264, an elaborate note collects the older cases upon this subject, and declares the law to be that where there is a precedent request the consideration can not be deemed an executed one. In the appendix to Pothier on Obligations it is said, in speaking of executed considerations: "Where the act which is the consideration of the promise is founded upon a preceding request, it is sufficient." 1 Pothier Obl. 20. In Powell on Contracts, 351, the rule is thus stated: "And a consideration past will be a good ground to maintain an action upon a subsequent promise or contract, where the consideration is stated to have been at the defendant's special suit and request; for the promise, though it follows, yet is not naked, but couples itself with the suit or request before, and the merits of the party procured by that suit or request." Addison says: "Bygone acts or services will sustain an action when performed or rendered pursuant to the previous request of the promisor." 1 Addison Con. 24, sec. 11; *Hicks v. Burhans*, 10 Johns. 243; *Livingston v. Rogers*, 1 Caine, 583; *Lampleigh v. Brathwait*, Hobart, 105; *Bradford v. Roulston*, 8 Irish C. L. 468; *Carson v. Clark*, 1 Scam. 113 (25 Am. Dec. 79). It is quite certain that the request to perform the services, coupled with the promise to pay for them, takes the case out of the rule that no action will lie for services rendered voluntarily or performed gratuitously, and that the same facts take the case out of the rule declaring an executed consideration to be insufficient to support a promise. Whatever may be thought of the reasoning of some of the earlier English cases, it can not be doubted that the conclusion that where there is a request, and continuous services of value are rendered to the person making the request, the consideration is a valid one, and will support a promise to pay for such services, although some of them were rendered prior to the request. 1 Wharton Con., sec. 515. In the case in hand the services were rendered before and up to the time of the execution of the note, and clearly

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come within the rule declaring a continuous consideration to be sufficient. 1 Chitty Con. 16; 1 Parsons Con. 468; Addison Con. 16; Powell Con., sec. 48; Comyns' Dig., title Assumpsit, B. 12; Pothier Oblig., Appendix, 19; *Loomis v. Newhall*, 15 Pick. 159; *Andrews v. Ives*, 3 Conn. 368; *Wiggins v. Keizer*, 6 Ind. 252; *Carroll v. Nixon*, 4 Watts & S. 517; *Bestor v. Roberts*, 58 Ala. 331.

The surrender, at the intestate's request, of the right or privilege of naming the appellant's child, was the yielding of a consideration. The right to give his child a name was one which the father possessed, and one which he could not be deprived of against his consent. If the intestate chose to bargain for the exercise of this right, he should be bound, for by his bargain he limited and restrained the father's right to bestow his own or some other name upon the child. We can perceive no solid reason for declaring that the right with which the father parted at the intestate's request was of no value. It is difficult, if not impossible, to invent even a plausible reason for affirming that such a right or privilege is absolutely worthless. The father is the natural guardian of his child, and entitled to its services during infancy, and within this natural right must fall the privilege of bestowing a name upon it. In yielding to the intestate's request, and in consideration of the promise accompanying it, the appellant certainly suffered some deprivation and surrendered some right. The rule is, that "It is sufficient, if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking." Addison Con., section 9; *Glasgow v. Hobbs*, 32 Ind. 440. Conceding that the intestate derived no benefit, still, as the appellant suffered some detriment and yielded a right, there is a legal consideration.

The concession that the intestate secured no benefit is one that can not be justly made, for he himself determined that the act done by the appellant, at his request, was a benefit to him. It is not necessary that the consideration for a promise should be a property one. It is true that the courts and text-

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writers use the words "valuable consideration," but this is done for the purpose of distinguishing the consideration from a good one, that is, one based upon love and affection, and from one resting on a purely moral obligation. "It is a familiar doctrine," says the Supreme Court of Texas, in *Hendricks v. Snediker*, 30 Texas, 296, "that there need be no pecuniary benefit passing to the vendor to make a consideration valuable." In most of the cases cited in discussing the first branch of this case, the consideration was something else than one having a pecuniary or property value. Others may be added. Thus, in *Gurvin v. Cromartie*, 11 Iredell, 174, the consideration was the undertaking of the plaintiff to take a wife and have a child born unto him. In *Adams v. Honness*, 62 Barb. 326, the consideration was the removal of the promisee to a place near the home of the promisor; and this was also the consideration in *Halsa v. Halsa*, 8 Mo. 303, and *Rumbolds v. Parr*, 51 Mo. 592. In *Worrell v. First Presbyterian Church, etc.*, 23 N. J. Eq. 96, the consideration was the resignation of the position of pastor of a church. In Anson on Contracts, 64, cases are collected upon this general subject, and the author says that courts "will not ask whether the thing which forms the consideration does in fact benefit the promisor, or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him." We find scattered through the books cases where devises of property are made upon conditions having no pecuniary value at all, and yet they are always enforced; and so we find men in life making subscriptions to colleges on condition that they shall bear their names, or endowing professorships upon condition that they shall be given their names, and, so far as our observation has extended, the validity of such conditions has never been challenged. It is evident that the naming of a college professorship or the like has always been considered as a matter of importance and value, for to declare otherwise

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would be to affirm that courts and law-writers have for ages been solemn respecters of worthless trifles. It will not do to say that the bestowal of a name is a valueless act, and if once it be granted to be of some value, then, in the absence of fraud and oppression, it must be held to possess the value placed upon it by the contracting parties.

Cases are cited showing the importance of the question of consideration where fraud and imposition are imputed to the party asserting the contract, and to the rule declared in those cases we yield undoubting assent. But here there is no question of fraud, imposition or oppression. The case is before us upon the pleadings, and there is no charge of fraud, nor any allegation that corrupt acts were done or undue advantage taken. We are not considering the case upon the evidence, and there are no inferences to be drawn from proved facts, but we are required to do no more than examine the allegations of the pleadings, and from them determine the rights of the parties.

Few rules are better settled than that fraud is never presumed, and that a party who relies upon fraud as a cause of action, or ground of defence, must charge it in his pleadings. Where there is no such charge, and no facts constituting fraud are pleaded, courts can not by any inferential process inject that element into the case.

Judgment reversed.

No. 9276.

KRUG, SHERIFF, v. DAVIS.

JUDGMENT.—*Execution.*—*Injunction.*—*Collateral Attack.*—An action to enjoin the enforcement of a judgment by execution is a collateral attack, and can be maintained only upon a showing that the judgment is void.

SAME.—*Summons.*—*Service.*—*Default.*—It is not cause for enjoining the enforcement of a judgment taken upon default, that no summons was is-

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sued under the seal of the court as required by law, that no such summons was ever issued and served in any manner, and that the party did not appear, and had no summons served upon him to appear to the action. **SAME.**—*Service of Process.—Sheriff's Return Conclusive.*—The return of the sheriff showing service of process being conclusive on the party, a judgment by default can be shown to be void for want of such service only by averment that the record does not show, and that there was in fact, no such return.

SAME.—*Legal Presumptions, Comparative Strength of.*—The presumption of regularity in the final judgment of the court is stronger than the presumption that the sheriff did not make a false return of the process.

SAME.—*Summons.—Seal of Court.*—A judgment by default is not void for want of the seal of the court upon the summons.

PLEADING.—*Facts and Conclusions of Law.*—A pleading should state facts, not legal conclusions merely.

From the Montgomery Circuit Court.

D. A. Roach and *N. P. H. Proctor*, for appellant.

G. W. Paul and *J. E. Humphries*, for appellee.

WOODS, C. J.—The appellant, as sheriff, had seized and was about to sell upon execution property of the appellee. The appellee obtained a judgment enjoining the sale, on a complaint wherein it is alleged that the judgment on which the execution was issued was void for the want of notice to the defendant. The appellant now insists, under a proper assignment of error, that the court erred in overruling his demurrer for want of facts to the complaint.

We need give only the allegations of the complaint in reference to the issue and service of the summons, as the sufficiency of the pleading in any other respect is not disputed. Upon this point it is averred: "That no summons was issued by the clerk of the court in said cause under the seal of the court, and directed and delivered to the sheriff of the county, as required by law, and no such summons was ever issued by the clerk of said court, nor served upon this plaintiff in any manner whatever; * * * that the court entered and rendered a pretended judgment against this plaintiff, * * by having him called and defaulted on the 25th day of September, 1879, and that plaintiff did not appear in said action in said court,

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and had no summons served upon him to appear in said action, and upon such default the court rendered the judgment."

It is a familiar doctrine that such a proceeding to enjoin the enforcement of a judgment by execution constitutes a collateral attack upon the judgment and can not be maintained on account of errors or irregularity merely, but only upon a showing that the judgment is void. *Gall v. Fryberger*, 75 Ind. 98; *Featherston v. Small*, 77 Ind. 143; *Stout v. Woods*, 79 Ind. 108.

The facts stated in this complaint do not show that the judgment in question was void. The allegation that no summons was issued under the seal of the court, and directed and delivered to the sheriff, *as required by law*, and that no *such* summons was ever issued, etc., is not good because, instead of alleging the facts, it states only a legal conclusion. *Clark v. Lineberger*, 44 Ind. 223; *Kellogg v. Tout*, 65 Ind. 146; *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Caskey v. City of Greensburgh*, 78 Ind. 233.

If, however, it be conceded that the seal of the court was not in any manner stamped upon the summons, the validity of the judgment was not affected by the omission. *Boyd v. Fitch*, 71 Ind. 306; *State v. Davis*, 73 Ind. 359.

It is alleged that the plaintiff did not appear to the action, "and had no summons served upon him to appear." If this be regarded as an averment that there was in fact no service of summons, with or without the seal of the court, there is still a failure to show that the court did not acquire jurisdiction of the defendant, because it is not alleged that the sheriff did not make return of a summons showing a proper service thereof upon the appellee.

It must be regarded as well settled in this State, that the truth of a sheriff's return, showing the service of process, can not be disputed by the party, even upon a direct application before default to have the return set aside or corrected, and much less, in reason, after the rendition of judgment, and by way of collateral attack. *Rowell v. Klein*, 44 Ind. 290

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(15 Am. R. 235); *Splahn v. Gillespie*, 48 Ind. 397; *Johnson v. Patterson*, 59 Ind. 237; *Stockton v. Stockton*, 59 Ind. 574; *Hite v. Fisher*, 76 Ind. 231.

It necessarily follows that besides, or instead of, denying the fact of service, the complaint should have alleged that there was not in fact, and the record of the judgment did not show, a return of service of summons upon the judgment defendant. It can not be presumed, in aid of the complaint, that the sheriff did not make a false return, because there is a stronger presumption in favor of the regularity and validity of the proceedings and judgment of the court.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

No. 8495.

HINDS ET AL. v. HINDS, EXECUTOR.

WILL.—Construction.—Intention.—In construing a will, it is the duty of the court to ascertain and carry into effect the intention of the testator, if it can be done; and this intention is to be ascertained from an examination of all the provisions of the will, in relation to the subject of inquiry.

SAME.—Bond.—Executor.—Trust and Trustee.—Limit of Liability.—The bond of an executor, given to secure the faithful discharge of his duties as executor, can not be construed as conditioned for the faithful discharge of his duties as trustee of a trust created by the will.

SAME.—Bond of Trustee.—Duty of Court.—It is the duty of the court having jurisdiction of an express trust to require the trustee to execute bond, with sufficient sureties, conditioned for the faithful performance of the duties of his trust, and the preservation of the trust estate.

From the St. Joseph Circuit Court.

L. Hubbard, for appellants.

A. Anderson and *J. Brownfield, Jr.*, for appellee.

Howk, J.—This suit was brought by appellee, as executor

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and trustee, to obtain a construction of the last will and testament of his testator, Hugh L. Hinds, deceased. The beneficiaries under the will are parties to the suit, either as plaintiff or defendants. The cause was tried by the court, and, at the appellants' request, the court made a special finding of the facts, and stated its conclusions of law thereon. The appellants' exceptions to the conclusions of law were overruled by the court, and judgment was rendered in accordance therewith.

The error assigned by the appellants is, that the court erred in its conclusions of law upon the facts specially found.

In the outset of his will, the testator, Hugh L. Hinds, made the following disposition of his estate: "It is my desire that my debts be all first paid, and then the rest and residue of all my estate, including choses in action, shall be regarded as a whole and entire estate, and as such I give, devise and bequeath the same to Caleb A. Kimball and my nephew, Hugh M. Hinds, in trust, for the uses and purposes following, to wit: One-third part thereof for my wife, one-third part thereof for my son, John Ward Hinds, and the other third part thereof for my said nephew, Hugh M. Hinds; said trust to continue for a period of twenty-five years."

Subsequently, the will contains the following provision: "It is further my will, that if my said nephew should die without lawful issue then alive, or the descendants thereof, then I give and bequeath his share of said property to my said son, or his descendants."

Upon this provision of the will, in connection with the context, the court stated the following conclusion of law: "8. That said Hugh M. Hinds has a vested interest, subject to said trust, in one-third of all of said trust fund, and in case he dies without issue then living, before sale of trust property and division of the fund, and John Ward Hinds, or his descendants then living, the devise over to John Ward Hinds will take effect, as a valid executory devise; but that said executory devise will be void and of no effect, as to such of the trust property as may have been sold, or such of the trust

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fund as shall have been divided among the legatees, before the death of said Hugh M. Hinds."

It is claimed by the appellants' counsel, "That so much of this conclusion of law as limits the operation of the executory devise to such of the trust estate as may be unsold or undivided, is erroneous." In other words, it is claimed by counsel, if we understand his position, that neither the sale nor the division of the trust property can or will defeat or prevent the operation of the executory devise of such property, on the happening of the contingency upon which the devise over will take effect. In the proper determination of this point, it is necessary, we think, that another provision of the will should be considered, as follows: "To enable my said trustees, or the survivors or survivor of them, to carry out the provisions of the trusts herein created, I hereby give, devise and bequeath to them all of my real estate, and hereby authorize and empower them, the survivors or survivor of them, to bargain, sell and convey said real estate, in fee simple, as fully and completely as I could do myself, if alive, vesting the title thereof in fee to the purchasers," etc. It is also provided in the will, "That if they, the trustees, are of opinion that it would be for the interest of the estate to sell off any of the personal property on my farm, in St. Joseph county, or about my dwelling, they are hereby authorized to do so, on the best terms the market will warrant, and use the proceeds to the best advantage of the estate."

Construing all these provisions of the will together, it is very clear, we think, that the trustees were clothed with full and ample power to sell, convey or otherwise dispose of all the trust estate, real or personal; and that, upon such sale and conveyance, or other proper transfer, of any part of the trust estate, the purchaser will take the specific property by an absolute title, wholly discharged from the trust, and freed from the operation of the executory devise. In such case, of course, the proceeds of the sale would become a part of the trust estate, in lieu of the property sold, and would be held by the

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trustees, subject to the contingencies and conditions provided in the will, until the expiration of the trust thereby created. Upon the expiration of the trust, and the division then made of the trust estate between the *cestuis que trust* named in the will, if such division be made before the death of Hugh M. Hinds, he will take his share of the trust estate, freed from the trust and from the operation of the executory devise, contained in the will. This view of the matter accords, we think, with the expressed wish of the testator, as shown by the following provision of the will: "It is further my desire, that, at the winding up of said trust, the proceeds arising from the sale of the trust property shall be divided between the parties entitled thereto, as it is received by said trustees." In construing the will, it was the duty of the court to ascertain and carry into effect the intention of the testator, if it could be done; and this intention was to be ascertained from all the provisions of the will, in relation to the subject of enquiry. *Fraim v. Millison*, 59 Ind. 123; *Tyner v. Reese*, 70 Ind. 432; *Lofton v. Moore*, 83 Ind. 112.

There is no substantial difference between the views we have expressed and the eighth conclusion of law above quoted, as we understand its meaning; and, therefore, the court did not err, we think, in that conclusion of law.

The eleventh conclusion of law, stated by the court, was as follows:

"11. That the bond executed by said executor is, under the laws of this State, designed to insure the faithful performance of his duty as executor only and not such duties as may be, by said will, devolved on or vested in him, as trustee only. And, therefore, when said executor shall have fully paid off all the debts and liabilities of said testator, and all the costs and charges of administration, and shall have paid all specific legacies, and shall have made proper accounting for said estate, and shall have taken the surplus of said estate into his hands as trustee, and entered on the care, management and disposition thereof, as trustee, under said will, he shall no longer be

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liable on said bond, nor shall such bond be construed as conditioned for the accounting of any money or property which he may thereafter receive or hold as such trustee."

The appellants' counsel insists that this conclusion of law is erroneous. Counsel says: "This is an attempt to discriminate between the duties imposed on the executor by this will, and to limit the liability on his bond, in effect the liability of his sureties, to a part of the acts specified in the will. In effect, it destroys the security of his bond; for, as may be fairly surmised, the testator left a large estate and few debts, and the management and control of his estate, as trustee, comprise all the duties of the executor, except a few formal matters in compliance with the statute. The years of care and management required till this infant son shall arrive at majority are wholly without any security, except the personal responsibility of the executor." We are not convinced by this course of reasoning that the bond of an executor, given to secure the faithful discharge of his duties as executor, ought to be or can be construed as conditioned for the faithful discharge of his duties as trustee. It happened in this case that the trustee of the trust created by the will was also appointed the executor of the will; but if some person other than the trustee had been appointed executor, it would hardly be claimed that the bond of the executor would or could be construed as securing the faithful discharge of the trustee's duties. It does not follow from the court's conclusion of law, that the *cestuis que trust* need be without any security, except the personal responsibility of the trustee, for the faithful discharge of the duties of his trust. The court below has jurisdiction of the trust created by the will of Hugh L. Hinds, deceased, and of the person of the trustee.

In *Thiebaud v. Dufour*, 54 Ind. 320, it was held that, under the provisions of the act of June 17th, 1852, concerning trusts and powers (secs. 2969 to 2987, R. S. 1881), the court having jurisdiction of an express trust may require the trustee of such trust to execute bond, with sufficient sureties, condi-

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tioned for the faithful performance of the duties of his trust, and the preservation of its funds. The case cited was approved and followed, on the point under consideration, in the more recent cases of *Tucker v. State, ex rel.*, 72 Ind. 242, and *Bates v. State, ex rel.*, 75 Ind. 463.

The court did not err in the construction placed upon the executor's bond.

We have considered all the questions discussed by the appellants' counsel, and have found no error requiring the reversal of the judgment.

The judgment is affirmed, with costs.

No. 9368.

MAYNARD ET AL. v. MIER.

PROMISSORY NOTE.—*Agreement for Attorney's Fees.*—*Demurrer.*—A void stipulation for attorney's fees in a promissory note does not invalidate the note, and consequently a demurrer to a complaint on the note does not bring in issue the validity of the stipulation.

From the Whitley Circuit Court.

A. C. Clemans and *C. Clemans*, for appellants.

J. W. Adair, for appellee.

WOODS, C. J.—Appeal from a judgment on a promissory note, a copy of which was filed with the complaint. It contains a promise in the ordinary form, to pay a sum named, "with interest at the rate of ten per cent. after maturity, and ten per cent. attorney's fees."

It is claimed that the court erred in overruling the defendants' demurrer to the complaint. The entire argument on the point is in these words: "The complaint is not sufficient in this, it is not definite and certain, and the copy of the note shows that the agreement (is) to pay ten per cent. attorney's

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fees, which we insist is void, and that, therefore, the note is usurious as to that amount, and should be held void, and the judgment reversed."

If the stipulation for attorney's fees were conceded to be void, the validity of the note would not be otherwise affected, and consequently the demurrer was properly overruled.

Judgment affirmed, with costs.

No. 10,447.

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CRIMINAL LAW.—Right of Defendant to Plead.—One charged with a crime has a right to plead, free from restraint and fear of violence.

SAME.—Remedy where Right to Plead is Denied.—Where the accused is forced, through fear of mob violence, to enter a plea of guilty, he has a right to relief from the judgment entered on such plea.

SAME.—Procedure.—Statutory Remedies.—Where the statute prescribes a remedy, it must be pursued, and resort can not be had in such a case to the common-law procedure.

SAME.—Procedure in Cases where Plea is Extorted by Violence.—The statute does not make provision for cases where the plea is forced from an accused through fear, and resort may be had to the common-law procedure.

SAME.—Pardon.—The fact that the power to pardon is lodged in the Governor does not deprive the courts of power to grant relief in a proper case.

SAME.—Effect of Pardon.—A pardon is the exercise of executive clemency, and, as an accused is entitled to an impartial trial, that right can not be denied him on the ground that the Governor may pardon in cases where he is satisfied that there is an unjust conviction.

SAME.—Common-Law Rules.—The rules of common law not inconsistent with our Constitution or statutes, and not opposed to our system of government, may be resorted to when necessary to vindicate a clear right.

SAME.—Courts.—Inherent Powers.—Courts possess inherent powers independent of legislative enactment, and among them is the power to prevent a judgment obtained by duress from being enforced against an accused person.

SAME.—Writ Coram Nobis.—The right to maintain a proceeding in the nature of a writ *coram nobis* has not been abrogated by our statute.

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SAME.—When Writ Coram Nobis Proper.—A writ *coram nobis* will lie when it is necessary for the accused to bring some new fact before the court which can not be presented in any of the methods provided by statute, but it will not lie in cases covered by statutory provisions.

SAME.—Duress.—Plea Extorted by.—Judgment.—A plea of guilty, forced from an accused by a well-grounded fear of mob violence, will not sustain a judgment of conviction when properly attacked.

SAME.—Setting aside Sentence.—A sentence pronounced on a plea of guilty, forced from an accused by a well-grounded apprehension of mob violence, may be set aside in a proceeding in the nature of a writ *coram nobis*.

SAME.—Jeopardy.—An accused is not in jeopardy where the only plea filed by him is one of guilty, and filed because of a well-grounded fear of mob violence.

SAME.—When Jeopardy Attaches.—An accused is not in jeopardy until the case is ripe for trial and the trial is actually entered upon, and jeopardy does not attach in cases where the only plea is one forced from the defendant by fear.

SAME.—Necessity.—Acts Excused by.—A defendant who enters a plea of guilty upon a necessity produced by well-grounded fear and imminent danger of mob violence, may avoid the plea by a proceeding in the nature of a writ *coram nobis*.

PRACTICE.—Writ Coram Nobis.—An issue of fact may be formed upon a petition for a writ *coram nobis*, and when so formed may be tried as other issues of fact are tried.

SAME.—Facts Admitted.—Where no issue is made, and the facts are conceded, it is the duty of the court to apply the law to the facts.

From the Clay Circuit Court.

N. G. Buff, J. T. Pierce and D. T. Morgan, for appellant.

F. T. Hord, Attorney General, *C. E. Matson*, Prosecuting Attorney, *W. W. Carter, G. A. Knight, C. H. Knight* and *W. W. Thornton*, for the State.

ELLIOTT, J.—This is an extraordinary case. The facts proved, the procedure adopted and the relief sought are strange and unusual.

The facts stated and proved are these: In April, 1878, Josephine Sanders, the wife of the appellant, was slain by a pistol shot; at the time she was in a room alone with her husband, and he did not and could not give any account of her death; he was then, and had been for many years, addicted to the use of alcoholic liquor and opium to such an extent

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that he had probably become insane ; he was arrested shortly after the death of his wife ; his case came on for trial ; his counsel and many witnesses of unquestioned veracity testify that at the time of his trial he was insane ; the homicide had aroused an intense feeling in the vicinity of the county-seat, where the killing was done, and the case put to trial ; threats were made of lynching by a mob ; counsel prepared an affidavit for delay, but feared to present it lest the mob should seize and hang the accused ; the sheriff of the adjoining county came to the county-seat of Clay county and warned the sheriff of that county of imminent danger from an armed mob ; a jury had been empanelled and a plea of not guilty entered, but so great was the threatened danger that counsel, to save, as they believed, their client's life, withdrew the plea of not guilty, entered a plea of guilty, on which, without evidence, the jury returned a verdict of guilty, and a life sentence was immediately pronounced upon the verdict by the court ; the accused was at once hurried to the train and conveyed to the State's prison. For the purpose of clearly exhibiting the situation at the time the plea of guilty was entered, we quote from the testimony of the gentlemen who were then appellant's counsel, and who are men of high character and undoubted integrity. One of them says : "As one of his counsel I urged and demanded of him a plea of guilty, with which I pledged myself to save his life ; his counsel all concurred ; Sanders always denying any knowledge of the homicide ; his counsel were responsible for the act of pleading guilty, believing at the time that it was the only course by which his life might be saved." Another one of the counsel says that "the accused was bewildered and refused, but finally seemed to consent, and at last appeared to acquiesce in letting counsel take their own course ; that the court was agitated and alarmed, and recommended and advised the plea of guilty." The turnkey of the jail, the sheriff of Clay and the sheriff of the adjoining county concur in stating that there was great and imminent danger of mob violence ; one of the jurors says that there was

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intense excitement among the large crowd of people present at the trial; that he was himself stationed at the door of the court-house to signal to the jail any movement of the mob; that the judge was greatly excited and said in the evening, that he "had not drawn an easy breath until he had seen the train in motion with Sanders aboard." There is much other evidence as to the presence of a large number of angry and excited men, and it is also shown that they uttered threats of violence and appeared determined to seize and hang the appellant unless punishment was at once imposed upon him.

The relief prayed is that the judgment entered upon the plea of guilty may be vacated and the appellant put upon his trial in due form of law.

There are strong reasons in support of the appellant's prayer. All men are by our laws entitled to a fair trial, in absolute freedom from restraint and entire liberty from fear of threats and violence. It is almost a mockery to call that a trial, or a judicial hearing, which condemns an accused upon a plea of guilty forced from his reluctant counsel by threats of an angry and excited mob, and interposed because they believed that to proceed with a trial upon a plea of not guilty would result in the hanging of their client by lawless men. A man who makes a promissory note because of fear is entitled to relief. A man who executes a deed under duress is entitled to judicial assistance. A will executed under the influence of fear falls before the law. These are small things when compared with life and liberty, and yet in the eyes of the law they are null. If such things are null when procured by fear, or extorted by violence, should not a plea be so, when to have refused it would have been to put in jeopardy the life of the man arraigned upon a charge of felony? In many respects the facts of this case go far beyond that of ordinary cases of duress, for here the officers of the law, judge, sheriffs and jailers were inspired with fear of violence; counsel of age and experience, influenced by the

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appearances of danger which surrounded their client, secured from him a reluctant acquiescence to the plea of guilty. More than this, the accused, if not at the time absolutely insane and incapable of understanding what he did, was weak and enfeebled in mind, and, as his counsel express it, "lost and bewildered."

That the case made is one entitling the appellant to some relief is clear, but whether the law vests the courts with power to grant it is by no means so clear. Unless the law, as it exists, confers this authority, then the courts do not possess it. Hard as the case may be and grievous as may be the suitor's situation, they can make no new law to fit his case. If a new law is needed it must come from the law-making power.

The right to pardon is vested in the chief executive of the State, and this, it is suggested, is the source from which relief must be obtained in such cases as this. But if the courts have power to grant relief, the fact that the Governor may pardon does not abridge a party's right to appeal to the courts for assistance. The power to pardon does not exclude the right to hear and determine; both powers may concurrently exist. Nor is a pardon always adequate relief. An innocent man suffering from an illegal sentence, procured by fraud or extorted by violence, may desire a trial and an acquittal which shall remove from his character the stain of guilt, and this the exercise of the pardoning power can not do. To pardon is to exercise executive clemency; it is an act of mercy. An acquittal is the vindication of a right, the award of justice. Again, the executive may not feel warranted in turning a condemned criminal loose, and, as he can grant no new trial, this he must do or deny a pardon. The court need not discharge, but may put the accused again to trial. We can not believe that the power to pardon was meant to cover every case of an unjust conviction, where the accused had, without fault on his part, not availed himself of the right of appeal.

If our statute provides exclusive remedies for the relief

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of an accused, then, of course, those remedies must be pursued, and our next enquiry naturally is, are such remedies provided?

There is the remedy by appeal; but this can not reach such a case as the one in hand. An appeal would have been unavailing.

The record showed a confession; for, on the face of the record, such the plea appeared to be, and there were no objections or exceptions. It is evident that the statutory provisions concerning appeals in criminal cases can have no application to a case like this. Here there were no errors committed in ruling on pleadings or in conducting a trial. In truth, there was no trial, and in law no confession; for a confession, like any other act, extorted by violence or procured through fear, is without effect. If, then, there was in fact no trial, and in law no plea of confession, there was a condemnation without either a trial or a confession by plea. If it be correct to affirm that the plea procured by fear is of no effect, it inevitably follows that the sentence was pronounced where no hearing was had and no guilt acknowledged. It seems clear, therefore, that the statute concerning appeals is not applicable, and, if not applicable, then it can in no sense be exclusive of other remedies, if any such there are.

There is the remedy by a new trial. That can have no application to a case where there was no trial. Again, it can not apply, because as the statute stood at the time of the appellant's sentence, the motion must have been made before judgment, and that, the record shows, would have been impossible in this case. No time intervened between the sentence and its execution. Once more, this remedy can not be meant for such a case as this, because the grounds for a new trial prescribed by the statute would not cover the wrong here committed, nor could it bring relief.

It is obvious that a motion in arrest of judgment can not be appropriate, for the face of the record is fair, and in appearance all the proceedings are regular. A motion for a

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venire de novo is not a statutory remedy, but is a recognized one borrowed from the common law, and it, as is sufficiently obvious, can have no application.

We find, then, no statute applicable, and consequently none excluding other known and recognized remedies, if any such there are, not inconsistent with our constitution and laws.

May we look to the common law? Our statute provides that, among other laws, "The common law of England, and the statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth), and which are of a general nature, not local to that kingdom," and not inconsistent with the Constitution of the United States or of the State of Indiana, and not inconsistent with the National and State statutes, shall be the law of the State. It is plain that no provision of the common law which prescribes a remedy for relieving an accused, who has been forced to plead in confession by lawless violence, can be deemed in conflict with the Constitution of the State or Nation; for both these instruments are explicit in their commands that all accused persons shall have a public and impartial trial, and shall only be condemned by due process of law. Nor is there any statute, as we have seen, which can be deemed inconsistent with a common-law remedy which will reach a case like this.

The common law did not authorize the granting of a new trial in cases of felony. *Rex v. Bertrand*, 10 Cox C. C. 618; Harris Crim. Law, 406. The remedy of an accused in cases where the court erred as to a matter of law was a recommendation to pardon, signed by the judges, and this was granted as a matter of course. *Reg. v. Murphy*, Law R. 2 P. C. 535. The remedy, where there was an error of fact, was by a proceeding called a writ *coram nobis*. This was a very common remedy in civil actions, but was seldom resorted to in criminal cases. Although rarely used in criminal cases, we find

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it conceded by courts and writers to be an appropriate remedy in criminal prosecutions as well as in civil actions. Judge Cooley, in a note to Blackstone's Commentaries, says: "In this chapter Sir W. Blackstone has considered only the modes by which a judgment may be reversed by writ of error brought in a court of appeal, and has stated that this can only be done for error in law. There is, however, a proceeding to reverse a judgment by writ of error in the same court, where the error complained of is *in fact* and not in law, and where of course no fault is imputed to the court in pronouncing its judgment. This writ is called the writ *coram nobis*, or *coram vobis*, according as the proceedings are in the king's bench or common pleas, because the record is stated to *remain* before us (the king), if in the former, and before you (the judges), if in the latter, and is not removed to another court. In this proceeding it is of course necessary to suggest a new fact upon the record from which the error in the first judgment will appear; thus, supposing the defendant, being an infant, has appeared by attorney instead of guardian, it will be necessary to suggest the fact of his infancy, of which the court was not before informed." In the note to *Jaques v. Cesar*, 2 Saunders, 100, the early English cases are cited, showing the scope, character and effect of the writ. The common-law doctrine is also discussed in Bacon Abridg., title Error; Comyns' Digest, title Proceeding in Error; 2 Tidd's Practice, 1136; 7 Robinson Pr. 149; Stephen Pl. 118. It is recognized in many of the States as forming a part of the law; it is so held in Alabama, *Holford v. Alexander*, 12 Ala. 280; in Arkansas, *Adler v. State*, 35 Ark. 517; S. C., 37 Am. R. 48; in Iowa, *McKinney v. Western, etc., Co.*, 4 Iowa, 420; in Kentucky, *Meredith v. Sanders*, 2 Bibb, 101; *Duff v. Combs*, 8 B. Mon. 386; *Combs v. Carter*, 1 Dana, 178; in Maryland, *Hawkins v. Bowie*, 9 Gill & J. 428; *Kemp v. Cook*, 18 Md. 130; in Michigan, *Teller v. Wetherell*, 6 Mich. 46; in Mississippi, *Fellows v. Griffin*, 9 Sm. & M. 362; *Keller v. Scott*, 2 Sm. & M. 82; *Land v. Williams*, 12 Sm. & M. 362; in Missouri, *Calloway v. Nifong*, 1 Mo.

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223; *Ex parte Toney*, 11 Mo. 661; *Powell v. Gott*, 13 Mo. 458; in New York, *Higbie v. Comstock*, 1 Denio, 352; *Maher v. Comstock*, 1 How. Pr. 175; *Smith v. Kingsley*, 19 Wend. 620; in North Carolina, *Roughton v. Brown*, 8 Jones, 393; in Ohio, *Dows v. Harper*, 6 Ohio, 518 (27 Am. Dec. 270); in Pennsylvania, *Wood's Ex'rs v. Colwell*, 34 Pa. St. 92; in Tennessee, *Hillman v. Chester*, 12 Heiskell, 34; *Patterson v. Arnold*, 4 Cold. 364; *Wynne v. Governor*, 1 Yerger, 169 (24 Am. Dec. 448); *Crawford v. Williams*, 1 Swan, 341; in Texas, *Mills v. Alexander*, 21 Texas, 154; *Moke v. Brackett*, 28 Texas, 443; *Giddings v. Steele*, 28 Texas, 732; and in Virginia, *Reid's Adm'r v. Strider's Adm'r*, 7 Grat. 76.

It is declared to be a part of the judicial procedure of the United States. *Pickett v. Legerwood*, 7 Pet. 144; *Strode v. Stafford*, 1 Brock. (U. S. C.) 162; *United States v. Plumer*, 3 Clifford (U. S. C.) 1. In *Pickett v. Legerwood*, *supra*, it was said: "The cases for error *coram vobis*, are enumerated without any material variation in all the books of practice, and rest on the authority of the sages and fathers of the law." Our text-writers agree in holding that the remedy exists, unless superseded or abolished by statute. Powell Appellate Proceedings, 107; Curtis Com., sec. 178; Freeman Judg., sec. 94. The author last named says: "The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication, made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court."

It is suggested in the argument of the counsel for the State that even at common law the writ *coram nobis* had fallen into disuse in criminal cases, and should not be regarded as part of the common-law procedure. All of the cases which discuss the question treat the rule as correctly laid down in the books of practice, and they all agree in declaring it applicable to criminal as well as civil cases. In the celebrated and bitterly

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contested case of *Regina v. O'Connell*, 7 Irish Law, 261, note 357, the writ was allowed, and no question made as to the right of the accused to demand it. The case was carried by appeal to the House of Lords, where, after a stubborn fight, the judgment of the Irish court was reversed; but no doubt was intimated as to the right of Daniel O'Connell and his associates to sue out the writ. *O'Connell v. Regina*, 11 Clark & F. 155, opinion, p. 252. In *United States v. Plumer*, *supra*, Judge CLIFFORD examined the authorities with care, and held that the writ would lie in criminal as well as in civil cases (*vide* opinion, p. 59). It is true that the writ was denied in that case, not, however, because it was not a proper procedure in a court of competent jurisdiction, but because the court to which the application was made had no jurisdiction at all in criminal cases. In *Adler v. State*, *supra*, the writ was held to lie in a case in some of its features remarkably like the present. But we will not extend the discussion by commenting on the cases. A somewhat careful and full investigation has enabled us to find many cases affirming the right to the writ in both civil and criminal cases, where there is no statute abolishing or superseding it, but none denying that it exists at common law and in jurisdictions where there is no overruling statute.

It is held in well considered cases, that, although there is a statute regulating proceedings in criminal cases, the writ is not abolished unless the statute expressly or by implication abrogates it or supplants it by some other remedy. This is so held, with respect to writs *coram nobis*, by MARSHALL, C. J., in *Strode v. Stafford*, *supra*, and it is so held in *Coke, Petitioner*, 15 Pick. 234. In speaking of the claim that the writ *coram nobis* can not exist under the statute, COWEN, J., said, in *Smith v. Kingsley*, 19 Wend. 620: "There is no statute expressly and in terms repealing its power, nor any which does so by necessary implication. Mere silence or omission to regulate proceedings upon such a writ will not operate as a repeal. The power, therefore, remains as at common law, except as to the mere form *coram nobis resident*; because the

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fiction of the record remaining before the King himself, is gone. We therefore have lost the name of the writ, but nothing more. *Camp v. Bennett*, 16 Wend. 48." This doctrine is in harmony with the well established principle that the statutory procedure blends with that of the common law. Mr. Bishop says: "The statute must be construed by the common law and in harmony with it, and by the common law must its defects be supplied." Statutory Crimes, section 366; Bishop Written Laws, section 142. This author also quotes with approval from our own case of *Walker v. State*, 23 Ind. 61, saying: "Again, where the common-law procedure has been to a greater or less extent superseded by statutes, 'the old rules are,' as observed in an Indiana case, 'continued in force, not inconsistent with the criminal code, and so far as they may operate in aid thereof.'" There are many instances in which our court has resorted to common-law methods of procedure where the statute is silent on the subject. *Marcus v. State*, 26 Ind. 101; *Bell v. State*, 42 Ind. 335; *Hardin v. State*, 22 Ind. 347; *State v. Berdetta*, 73 Ind. 185 (38 Am. R. 117); *Wall v. State*, 23 Ind. 150; *Burk v. State*, 27 Ind. 430. But it is useless to multiply citations; there are comparatively few criminal cases that do not contain some reference to common-law principles. What, for instance, would be our situation upon the question of self-defence, if we could not look beyond our statute to ascertain what it is, and what the procedure is in cases where it is an essential element? In civil proceedings the rule is firmly settled that there are cases where relief will be granted, although there is no specific remedy provided by statute. Bigelow Frauds, 170; 3 Whart. Crim. Law, 3222; Freeman Judg., section 99; *Dobson v. Pearce*, 12 N. Y. 156; *Molyneux v. Huey*, 81 N. C. 106; *Jarman v. Saunders*, 64 N. C. 367; *Huggins v. King*, 3 Barb. 616; *Stone v. Lewman*, 28 Ind. 97; *Johnson's Adm'rs v. Unversaw*, 30 Ind. 435; *Nealis v. Dicks*, 72 Ind. 374. That courts possess inherent powers not derived from any statute is undeniably true. Among these powers are the right to correct their records so as to make them speak the

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truth, to pass upon the constitutionality of statutes, to prevent the abuse of their authority or process, and to enforce obedience to their mandates. If it were granted that courts possess only such rights and powers as are conferred by statute, they would be mere creatures of the Legislature, and not independent departments of the government. They are not mere creatures of the Legislature, but are co-ordinate branches of the government and in their sphere not subject to legislative control. *Deutschman v. Town of Charlestown*, 40 Ind. 449; *Cooley Const. Lim.* 114, 116; 2 *Story Const.* 377.

It is our opinion that the courts have the power to issue writs in the nature of the writ *coram nobis*, but that the writ can not be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law—the motion for a new trial and the right of appeal—and these very materially abridge the office and functions of the old writ. These afford an accused ample opportunity to present for review questions of fact, arising upon or prior to the trial, as well as questions of law; while at common law the writ of error allowed him to present to the appellate court only questions of law. Under our system all matters of fact reviewable by appeal, or upon motion, must be presented by motion for new trial, and can not be made the grounds of an application for the writ *coram nobis*. Within this rule must fall the defence of insanity as well as all other defences existing at the time of the commission of the crime. Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters.

Duress not only avoids all acts, but it also relieves from responsibility for crime. 1 *Archbold Crim. Pr.* 52; 1 *Hale P. C.* 56; 1 *East P. C.* 70. Necessity justifies many things as against an accused; it justifies the discharge of a jury, although the trial has been duly entered on, because of the illness of a judge or juror; it dispenses with essential averments in indictments. 1 *Bishop Crim. Proced.* 493; *Bescher v. State*,

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32 Ind. 480; *Mixon v. State*, 28 Am. R. 695. In *Commonwealth v. Jailer, etc.*, 7 Watts, 366, a prisoner applied for a discharge under the provisions of a statute which entitled an accused to a trial or discharge at the second term of the court after his arrest. He had been afflicted with smallpox, and was recovering, but, as the report says, "his aspect was so loathsome as to spread a general panic." The application for a discharge was refused, the court saying: "There is no doubt that necessity, either moral or physical, may raise an invariable exception to the letter of the *habeas corpus* act. A court is not bound to peril life in an attempt to perform what was not intended to be required of it." If, as against an accused, the Government may invoke the doctrine of necessity and compulsion, may it not be invoked by him for the purpose of relieving himself from a plea wrung from him by fear of immediate and violent death? The assistance asked does not go to the extent of discharging without a trial, but the appeal is for relief from a plea of confession and for the award of an opportunity for trial. The application of the appellant brings to the knowledge of the court a fact which, if known, would have prevented a conviction; and all the cases agree that where a new fact is suggested which would have prevented judgment, the accused is entitled to the writ *coram nobis*. We can not conceive it possible—possible, we mean, in a legal sense, and under legal principles—that a court, with knowledge that a plea of guilty is forced from a prisoner by fear of death, would imprison him for life without a hearing or trial.

Duress is a species of fraud. Mr. Bishop says: "The common-law doctrine is familiar, that fraud vitiates every transaction into which it enters." 1 Bishop Crim. Law, 1008. It is a principle of wide application, that a judgment obtained by fraud may be annulled. The fraud, however, must be as to some act in securing jurisdiction, or as to something done concerning the trial or the judicial proceedings themselves; the rule has no application to cases of fraud in the transaction, or matters connected with it, out of which the legal con-

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troverſy aroſe. Bigelow thus ſtates the rule: “The fraud referred to muſt conſiſt either in facts relating to the manner of obtaining juřiſdiction of the cauſe, to the mode of conducting the trial, or to the concoction of the judgment, or in facts not actually or neceſſarily in iſſue at the former trial.” Bigelow Frauds, 170. “Fraud,” ſaid DEGREY, C. J., in *Rex v. Ducheſs of Kingſton*, 20 How. St. Trials, 355, 544, “is an extrinſic, collateral act; which vitiates the moſt ſolemn proceedings of courts of juſtice. Lord Coke ſays, it avoids all judicial acts, eccleſiaſtical or temporal.” There is, indeed, no diversity of opinion as to the effect of the fraud, for it is agreed on all ſides, as ſtated by Mr. Freeman, in ſpeaking of judgments, that “Upon proof of fraud or collusion in their procurement they may be vacated at any time.” While there is entire harmony upon this point, there is ſome diversity of opinion as to whether a judgment can be collaterally impeached for fraud. Freeman Judg., ſections 99, 132; *Wiley v. Pavey*, 61 Ind. 457. In his diſcuſſion of this ſubject Mr. Biſhop ſays: “In criminal caſes, there is no queſtion, that, when fraud is practiced at the trial by the proſecutor, producing a conviction, a new trial will be granted on the prayer of the defendant.” 1 Biſhop Crim. Law, ſection 1009. As againſt the accused the rule goes much further, for it is held that if the judgment of acquittal is obtained through his fraud it is an abſolute nullity. 1 Archbold Crim. Pr. 352, caſes cited in *n*; 1 Whart. Crim. Law, ſection 546; 1 Biſhop Crim. Law, ſection 1010; 3 Whart. Crim. Law, ſection 3222; *Commonwealth v. Daſcom*, 111 Maſs. 404; *Commonwealth v. Alderman*, 4 Maſs. 477; *Halloran v. State*, 80 Ind. 586; *Watkins v. State*, 68 Ind. 427 (34 Am. R. 273). In the caſe under conſideration the fraud, it is true, is not that of the proſecutor, but it is ſuch a fraud as deprived the appellant of the conſtitutional right to a fair trial by an impartial jury, and ſurely this entitles him to ſome relief, and under the elementary maxim, that “there is no right without a remedy,” there muſt be ſome power to grant relief, and ſome remedy by which it can be ſecured.

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The practice in cases similar to this is unsettled (we have found no case exactly like it), and we think that the rule indicated by Mr. Bishop is the correct one. "When a proceeding," says this author, "is entirely fraudulent, having no sound part whatever, there is no collateral or direct effect to be given it; it is as though it had not been; only a party to the fraud is not permitted to rely on this imperfection. But practically most frauds relate only to some particular in the proceeding,—not vitiating, therefore, the whole." 1 Bishop Crim. Law, section 1011. The fraud in this case extends only to the plea and subsequent proceedings, and the appellant may, therefore, be rightfully put to trial upon the original indictment.

It is the general rule, that, in order to sustain a verdict in a criminal case, there must be a plea. In *Johnson v. People*, 22 Ill. 314, it is said: "But it is believed that the practice is uniform, both in England and this country, in requiring the formation of an issue to sustain a verdict. Without it there is nothing to be tried by the jury." *Yundt v. People*, 65 Ill. 372; *Hoskins v. People*, 25 Am. R. 433. This is the doctrine of our own cases. *Tindall v. State*, 71 Ind. 314; *Graeter v. State*, 54 Ind. 159; *Fletcher v. State*, 54 Ind. 462. The rule goes so far as to declare that an arraignment is essential, and that until there has been an arraignment, the case is not ripe for trial. *Fletcher v. State*, *supra*; *Weaver v. State*, 83 Ind. 289; *Regina v. Fox*, 10 Cox C. C. 502.

No jeopardy attaches until the case is ripe for trial and the trial actually entered upon; and here the case was not ripe for trial, because the plea extorted from the appellant was null, and he was, therefore, not in legal jeopardy. The proceeding adopted by the appellant is, in its general features, and in its consequences, closely analogous to a motion for a new trial, and as a defendant, who takes a new trial granted at his own request, can not claim that the finding set aside constitutes a prior jeopardy, he can not do so in a proceeding like this. *Veatch v. State*, 60 Ind. 291.

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We do not deem it necessary to discuss the question of the appellant's insanity at the time the plea of guilty was entered. There are cases holding that such a cause will support a motion for a writ *coram nobis*, or some proceeding of like character. *Adler v. State, supra*; *State v. Patten*, 10 La. An. 299; 1 Whart. Crim. L. 52, note *r*; 1 Bishop Crim. L., section 396, auth. n.; *McClain v. Davis*, 77 Ind. 419. All we deem it necessary to say upon this point is, that if the court below has determined this question before receiving the plea, an appellate court should be slow to interfere, if it, indeed, should interfere at all, and should only do so upon clear and convincing evidence. The question of the appellant's capacity is, however, a circumstance of importance to be taken into consideration, in connection with his conduct when a plea was entered, as this was, under circumstances threatening great and immediate peril. *Ewell Lead. Cas.* 771.

The case comes to us upon uncontradicted evidence that the plea of guilty was not the voluntary act of the accused, but was induced by fear of violence. There is no necessity, therefore, for another trial upon this issue of fact. The fact of the existence of unlawful and violent compulsion, which deprived the appellant of freedom of will and liberty of action is settled, and settled without contrariety of evidence or conflict of testimony, and upon that issue nothing remains for trial. With the undisputed facts before us, the only course open to us is to pronounce judgment of law upon the facts thus established. If the State had made an issue of fact, or offered opposing evidence, then another trial would have been necessary. It is no doubt true that the State may make an issue of fact by controverting the allegations in the motion of the accused, or by offering opposing evidence, and in the event that an issue of fact is joined or presented it is to be tried as other issues of fact are tried. Where, however, as here, the State offers no evidence, and makes no denial, and the evidence of the accused is uncontroverted, there is no necessity for a trial. We have decided the case upon the motion and evidence ad-

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duced in its support, and not upon the demurrer to the complaint.

Judgment reversed, with instructions to vacate the judgment upon the indictment against the appellant; to permit him to withdraw the plea of guilty, and plead to the indictment; to put him upon trial in due form of law upon the indictment preferred against him, and for further proceedings in accordance with this opinion.

The clerk will issue the proper order for the return of the appellant.

Petition for a rehearing overruled.

No. 7350.

COX ET AL. v. DILL ET AL.

PRACTICE.—*Real Estate, Action to Recover.*—*New Trial as of Right.*—*Oral Motion.*—During the term at which a judgment for the recovery of real estate has been rendered, a new trial as of right upon payment of costs may be granted upon oral motion.

SAME.—*Exception.*—*Waiver.*—At the same term of court at which a judgment has been rendered, a new trial may be granted upon oral motion, and unless an exception be taken at the time, error can not be assigned upon the ruling.

SAME.—*Cross Complaint, Separate Trial of Issues on.*—*Partition.*—If, in an action for partition, issue is joined upon a cross complaint of one of the defendants claiming a part of the land, and that issue be tried separately, the action on the petition being continued, no question can be made, on appeal from the judgment on the cross complaint, in respect to the petition or the proceedings upon it.

EVIDENCE.—*Handwriting.*—*Expert.*—An expert may state his opinion whether or not the writing in question is in a feigned hand.

SAME.—*Practice.*—A party, to present any question upon the refusal of the court to permit his witness to answer an interrogatory, should inform the court what he expects to prove.

From the Orange Circuit Court. .

J. Cox and W. W. Spencer, for appellants.

J. Baker, for appellees.

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WOODS, C. J.—The appellees petitioned for the partition of numerous tracts of land, claiming as lineal descendants and heirs at law of William A. Bowles, who had died intestate, seized of the lands in fee. The appellants besides Mrs. Bowles, the widow, were made defendants to answer to a claim which, as the petitioners averred, they wrongfully asserted to a part of the lands.

The appellants, without answering or denying the petition, filed a cross-petition or counter-claim, alleging that, while in life, Bowles had conveyed by deed a part of the lands mentioned in the petition to Mrs. Cox, and that the petitioners, therefore, had never owned or had any interest in the lands so conveyed, and praying that her title be quieted against the asserted right of the petitioners. To this the petitioners answered by a general denial; and the issue so formed upon the counter-claim was separately submitted to the court for trial, and a finding and judgment rendered in favor of the appellants. The appellees, at the same term when the judgment was rendered, moved for a new trial as of right, which motion, upon it being made to appear that the movers had paid the costs of the trial had, the court granted. The appellants took no exception to the granting of this motion, but consented to the setting down of the cause for a re-trial on a day named.

By means of various dilatory steps and motions interposed by the appellants, another trial was not had until after the lapse of more than a year from the first trial, and after the expiration of the year, and before entering upon the second trial, the appellants moved the court for an order upon the appellees to show cause why the order granting a new trial should not be set aside, because made upon oral motion only, and because all the costs had not been in fact paid. This motion was supported by affidavits, but the court overruled it because the record showed the payment of the costs and a waiver of a written motion.

The appellants now insist that this ruling was wrong, and

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that the original judgment should be reinstated. The following authorities are cited: Buskirk's Practice, 263; *Falls v. Hawthorn*, 30 Ind. 444; *Ferger v. Wesler*, 35 Ind. 53; *Whitlock v. Vancleave*, 39 Ind. 511; *Blizzard v. Blizzard*, 40 Ind. 344; *Crews v. Ross*, 44 Ind. 481; *Golden v. Snellen*, 54 Ind. 282; *Marsh v. Prosser*, 64 Ind. 293; *Steeple v. Downing*, 60 Ind. 478.

The propositions contended for upon these authorities can not avail the appellants. Their failure to except to the order granting a new trial, made at the term at which the judgment was rendered, was a clear waiver of the right to object. While the proceedings were *in fieri*, the court had full power over its record, and could, upon oral motion, as well as upon written, set aside its orders and judgments. The parties were constructively in court, and bound to take notice of what was done, and, consequently, a failure to except was a waiver of objection. R. S. 1881, sec. 626; *McClellan v. Binkley*, 78 Ind. 503. Besides, the appellants' subsequent conduct in the case was such as to constitute a waiver. *Marsh v. Elliott*, 51 Ind. 547; *Vernia v. Lawson*, 54 Ind. 485; *Marsh v. Prosser*, *supra*.

The appellants have also assigned as error that "the complaint on which the trial was had does not state facts sufficient," etc. We have already seen that the only issue joined and tried was upon the cross complaint of the appellants. The record shows this affirmatively. It is true that the cross complaint purports to be an answer and cross complaint, but it has often been held that a pleading can not subserve such a double purpose. *Harness v. Harness*, 63 Ind. 1; *Wilson v. Carpenter*, 62 Ind. 495; *Schee v. McQuilken*, 59 Ind. 269; *Campbell v. Routt*, 42 Ind. 410. The pleading was treated by the parties and by the court below as a cross complaint only, and when judgment was rendered upon it the issue tendered in the petition for partition was expressly continued for future determination; the appellants, therefore, can not now be permitted to assert, as they do, that it amounted only

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to a denial of the petition. It did not in fact, however, amount to a general denial.

The appellants complain of the instructions given and refused by the court; but the principal objections made all turn upon the question whether the burden of proof in respect to the execution of the deed under which Mrs. Cox claimed title was upon one or the other party. It is clear from what has already been said that the burden was upon the appellants. By their cross complaint they assumed the position of plaintiff, and by the denial of the appellees they were put under the necessity of making complete proof. They could win only upon the strength of their own title as they had alleged it to be. The appellees, under this issue, were not required to make proof of their heirship, or of any of the facts alleged in their petition; and if any of the instructions assumed such heirship it was immaterial and harmless.

It is not error to instruct that an expert in reference to handwriting "may state to the jury his opinion whether or not the writing in question is in a feigned hand." This is simply to state the witness's belief or opinion in respect to the genuineness of the writing or signature.

The appellants propounded certain questions to some of their witnesses to which the court sustained a general objection by the appellees. These rulings present no question, because the appellants did not indicate to the court what answers they expected to elicit. If it be said that the questions themselves indicated the expected answers, then it is to be presumed that the court overruled them as leading.

Judgment affirmed, with costs.

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No. 9692.

BARLEY, ADMINISTRATOR, v. DUNN, ADMINISTRATOR.

ASSIGNMENT OF ERRORS.—*Supreme Court.*—Errors of law occurring at the trial, such as admitting or excluding evidence, and giving, modifying, or refusing instructions, are not proper subjects for specifications in an assignment of errors.

SAME.—In such case, a specification, that the court erred in overruling the motion for a new trial, presents for review all errors at the trial properly excepted to at the time and stated in the overruled motion.

PRACTICE.—*Evidence.*—*Testimony.*—*Bill of Exceptions.*—A conclusion of a bill of exceptions, "And this was all the *testimony*, either verbal or written, that was introduced, heard or read on the trial of said cause," is not the equivalent of "This was all the *evidence* given upon the trial of the cause." The word "testimony" does not include documentary evidence.

SAME.—*Exceptions to Decisions During Trial.*—*Instructions.*—Under section 343, Code of 1852, a bill of exceptions, upon overruling a motion for a new trial, did not, as now, under R. S. 1881, section 626, carry forward exceptions taken to decisions made during the trial; and instructions in a bill of exceptions were not thereby incorporated in the record.

From the Grant Circuit Court.

J. F. McDowell, G. L. McDowell and J. A. Kersey, for appellant.

A. Steele and R. T. St. John, for appellee.

FRANKLIN, C.—Elizabeth Ruff filed a claim against George F. Dunn, as administrator of the estate of David Bish, deceased. Before the case was tried claimant died, and Madison M. Barley was appointed as her administrator, and was substituted as plaintiff in the case.

Under an agreement that "all facts might be given in evidence that would be competent in any state of pleading," a trial was had before a jury; a verdict was returned for appellee, and, over a motion for a new trial, judgment was rendered for appellee.

In this court appellant has assigned seven specifications of error. The first six thereof are upon the introduction of evidence, and instructions to the jury. These are not proper subjects for the assignment of errors; they can only be con-

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sidered in this court when properly embraced in a motion for a new trial. Hence the seventh specification of errors, that the court erred in overruling the motion for a new trial; presents the only question for our consideration.

The first four reasons for a new trial are in relation to the sufficiency of the evidence to support the verdict, and averring that it is contrary to law.

The fifth reason is for the erroneous admission of testimony. The sixth, seventh, eighth, ninth and tenth are in relation to the instructions.

The question as to the admissibility of testimony is not presented by a bill of exceptions, and can not be made a part of the record by being embraced in the motion for a new trial.

Counsel for appellee have filed a motion to strike from the record the bill of exceptions, for the reasons that it was not filed at the term at which the trial was had, and that no time was then given for it to be filed afterwards; and for the further reason that it does not aver that it contained all the evidence given upon the trial of the cause.

The concluding paragraph of the bill is as follows: "And this was all the testimony, either verbal or written, that was introduced, heard or read on the trial of said cause." This is not equivalent to saying that "this was all the evidence given upon the trial of the cause." This is insufficient. The word "testimony" does not include documentary evidence. *McDonald v. Elfes*, 61 Ind. 279; *Sessengut v. Posey*, 67 Ind. 408 (30 Am. R. 98).

The trial was had at the November term of the court, 1880. The motion for a new trial was filed at that term. The record, without showing that anything more was done in the case at that term, by a continuance or otherwise, shows that at the February term, 1881, the motion for a new trial was overruled, and that time was then given, extending beyond that term, in which to file a bill of exceptions, and it was filed within the time then given. This bill of exceptions could only bring forward the evidence given upon the trial

Barley, Administrator, v. Dunn, Administrator.

of the cause, and could not bring forward exceptions made to rulings during the trial. The 343d section of the code of 1852 provides that "The party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court." This provision of the code is now changed by the 626th section of the revision of 1881, which provides: "That if a motion for a new trial shall be filed in a cause in which such decision, so excepted to, is assigned as a reason for a new trial, such motion shall carry such decision and exception forward to the time of ruling on such motion, and time may be then given by the court within which to reduce such exception to writing." But the new code did not go into force until September 19th, 1881, and can not apply to the case under consideration.

The instructions asked, given, or refused, are not attempted in any other way than by the bill of exceptions, to be made a part of the record; and this can not be done by embracing them in a bill of exceptions filed after the next term of the court, no time having been given at the term of the trial. There is no question properly presented upon the instructions. See the case of *Indianapolis, etc., R. R. Co. v. Pugh*, *ante*, p. 279, and authorities there cited.

And as the bill of exceptions does not purport to contain "all the evidence given upon the trial of the cause," no question is presented as to the sufficiency of the evidence to sustain the verdict, and we can not determine that the verdict is contrary to law.

There is no available error in the overruling of the motion for a new trial.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Loftin, Treasurer, v. Citizens National Bank.

No. 10,463.

LOFTIN, TREASURER, v. CITIZENS NATIONAL BANK.

TAXES.—*Real Estate of National Banks.—How Taxed.—Statutes Construed.—*

Real estate owned by a National bank, by the provisions of the statutes, State and National, as construed together, should be assessed for taxation as realty in the township where situated, and not as a part of the capital stock of the bank.

From the Superior Court of Marion County.

R. B. Duncan, C. W. Smith and J. S. Duncan, for appellant.

T. A. Hendricks, C. Baker, O. B. Hord and A. W. Hendricks, for appellee.

WOODS, C. J.—The appellee brought this action to enjoin the sale of certain real estate for taxes assessed upon it for the years 1878 and 1879. Error is assigned upon the overruling of the demurrer to the answer; but it is not necessary to give a statement of the pleadings. Counsel for the appellee say, that the precise question for determination is this: "May the assessor of a township, wherein a National bank is situated, in assessing the value of the capital stock of said bank, exclude from consideration the real estate taken by the bank in payment of debts, and thereafter, and as a part of a complete assessment of the property of the township, assess the real estate, as such, against the bank?"

Substituting *must* for *may*, we think the proposition sufficiently accurate. It can not be that the assessor had a discretion to exercise. It was his duty to assess the real estate as such, or it was not. If it was his duty so to assess it, the taxes in question are valid, and the sale should not be enjoined, notwithstanding the value of the real estate may have been included in the assessment of the stock. If it was not his duty to assess the realty as such, then the taxes in question are unlawful and invalid, and the sale should be enjoined, even though it should appear that the value of the realty was excluded or not considered in the assessment of the capital stock.

85	341
147	492

85	341
155	609

85	341
162	315

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The following statutory provisions have been referred to as bearing upon the discussion :

From the act approved December 21st, 1872, 1 R. S. 1876, p. 72 :

“Sec. 16. All real property and merchants’ and manufacturers’ stock shall be listed and returned for taxation in the county, township, city or town in which it is situated.

“Sec. 57. Every bank, (other than a National bank,) banker, broker, or stock-jobber, shall, at the time fixed by this act for listing personal property, make out and furnish the assessor a sworn statement, showing :

“*First.* The amount of money on hand or in transit.

“*Second.* The amount of funds in the hands of other banks, bankers, brokers, or others, subject to draft.

“*Third.* The amount of checks, or other cash items, the amount thereof not being included in either of the preceding items.

“*Fourth.* The amount of bills receivable, discounted or purchased, and other credits due, or to become due, including accounts receivable, and interest accrued but not due, and interest due and unpaid.

“*Fifth.* The amount of bonds and stocks of every kind, and shares of capital stock, of joint stock, or other companies or corporations, held as an investment, or any way representing assets.

“*Sixth.* All other property appertaining to said business, other than real estate, (which real estate shall be listed and assessed as other real estate is listed and assessed under this act).

“Sec. 59. Banking, bridge, express, ferry, gravel road, gas, insurance, manufacturing, mining, plank road, savings bank, stage, steamboat, street railroad, transportation, turnpike, and all other companies and associations incorporated under the laws of this State, (other than National banks,) shall, in addition to the other property required by this act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly :

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“*First.* The name and location of the company or association.

“*Second.* The amount of capital stock authorized, and the number of shares into which such capital stock is divided.

“*Third.* The amount of capital stock paid up.

“*Fourth.* The market value, or if no market value, then the actual value of the shares of stock.

“*Fifth.* The total amount of indebtedness, except the indebtedness for current expenses—excluding from such expenses the amount paid for the purchase or improvement of property.

“*Sixth.* The assessed valuation of all its tangible property. Such schedule shall be made in conformity to such instruction and forms as may be prescribed by the Auditor of State. In all cases of failure or refusal of any person, officer, company, or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information which he can obtain.”

Sec. 60, as amended by the act approved March 5th, 1877, Acts 1877, Reg. Sess., p. 141: “Such statements shall be scheduled by the assessor, and such schedule, with the statements so scheduled, shall be returned by the assessor to the county auditor. The auditor shall annually, on the meeting of the county board of equalization, lay before said board the schedules and statements herein required to be returned to him, and said board shall value and assess the capital stock of such companies or associations, in the manner provided in this act, and the said auditor shall compute and extend the taxes, for all purposes, on the respective amounts so assessed, the same as may be levied on the other property in such towns, cities, or other localities, in which such companies or associations are located: *Provided*, That the schedules and statements required by this act to be furnished by railroad, transportation and express companies, shall be forwarded by the county auditors to the auditor of State, to be by said auditor of State

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laid before the State Board of Equalization, for their action, as originally intended in this act.

“Sec. 62. The shares of capital stock in any bank located within this State, whether organized under the laws of this State or of the United States, shall be assessed to the owner thereof in the county, township, city or town where such bank or banking association is located,” etc.

“Sec. 64. The president or cashier of every bank or banking association contemplated by the sixty-second section of this act, shall make out, in addition to the other property required by this act to be listed, a statement under oath, showing the number of shares comprising the capital stock of such bank, the name and residence of each stockholder, with the number of shares owned by such stockholders in such bank, the par and cash value of each of said shares, and also the par and cash value of the entire capital stock of such bank or banking association, on the 1st day of April, and shall deliver such statement to the county auditor in the county wherein such bank or banking association is located, on or before the 1st day of May; and the county auditor shall deliver to the proper assessor a copy of such statement, and such capital stock shall thereupon be listed and assessed by the assessor, and return thereof made in all respects the same as similar property belonging to other corporations and individuals, except that it shall be treated as personal property belonging to banks or banking associations, under the name and style of capital stock.

“Sec. 65. Should any president or cashier of such bank or banking association fail to make and return such statement within the time aforesaid, the auditor of the proper county shall summon the president and cashier of such bank or banking associations, to appear forthwith before him, with the books of such bank or banking association; and said auditor is hereby empowered to compel the attendance of said officers, in obedience to such summons, and to examine them under oath, and

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to make such investigations at the expense of such bank or banking association as may enable him to obtain the information provided for in the sixty-fourth section of this act.

“Sec. 66. The county auditor shall enter the valuation of such capital stock on the tax duplicate of the current year, and shall compute and extend taxes thereon the same as against the valuation of other property in the same locality.”

U. S. R. S., sec. 5219: “Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.”

Under section 16, we start with the proposition, that “All real property * * shall be listed and returned for taxation in the county, township, city or town in which it is situated.” This declaration is universal, and if there can be an exception, it is because some other provision of the statute requires it.

The Constitution of the State, article 10, section 1, imposes upon the General Assembly the duty to “provide by law for a uniform and equal rate of assessment and taxation * * of all property, both real and personal.”

This does not mean that the rate of assessment shall be

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uniform and equal for all purposes throughout the State, *City of Richmond v. Scott*, 48 Ind. 568 ; but it clearly does require a uniform and equal rate throughout the locality in which the particular tax is levied ; if for State purposes, then in all parts of the State alike ; if for county purposes, in the entire county ; and so in township, town or city, for the local purposes of each. *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185 ; *Bright v. McCullough*, 27 Ind. 223.

The important question is involved here, whether the Legislature has power, in the manner asserted by the appellee, to exempt any real estate from taxation as such in the locality of its situation. Interpreted according to the natural meaning of its terms, this provision of the constitution would seem to give assurance to every owner or purchaser of such property in any place, that his possession should bear only its proportion of the public burdens, and that all other like property in the same jurisdiction should be taxed in the same manner and to the same extent ; in other words, that the burdens and benefits of taxation should be apportioned by a uniform rule.

If, because a piece of real estate had come into the ownership of a National bank, it was exempted from taxation as such, and must be deemed to have been included in the valuation of the capital stock of the bank, then, if the bank's indebtedness exceeded the value of its property, making its stock worthless, the real estate, however valuable, must have escaped taxation entirely ; or, if the depreciation of the stock were only partial, then the escape of the realty of the bank from taxation was partial, and in proportion to the depreciation of the stock. Again, if the bank had been situated in one part of the State, and the realty in another, even assuming what must have been quite improbable, that, whether assessed as land or as capital stock, the valuation would have been the same, the purposes and the rate of its taxation as capital stock must have been different from the purposes and rate of taxation where the land is located. By such a rule, valuable property in the largest city of the State might have

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been transferred for taxation to the smallest town, and *vice versa*; and the burdens of taxation, not only upon the particular property transferred, but upon all other property in the localities affected, have been changed.

But, waiving the constitutional question, we proceed with the requirements of the statute.

It is difficult, and perhaps impossible, to place upon these provisions a construction which will give full and consistent force to all the expressions used. The 57th and 59th sections in terms exclude National banks. The sixth clause of section 57 reiterates the requirement of section 16, that the real estate of the banks, bankers, brokers, etc., referred to in that section, should be listed and assessed as other real estate. This section, it would seem, was intended to apply to unincorporated banks. The 59th section applies to incorporated banking and other companies, and by the sixth clause requires of each a statement of "the *assessed* valuation of all its tangible property." This would seem to imply that there should first be an assessment of the tangible property (including realty), and that the valuation placed thereon should be included in the statement which, by section 60, is required to be returned to the auditor of the county, and laid before the county board of equalization as the basis for valuing and assessing the capital stock. The value of the capital stock would necessarily include the assessed valuation of tangible property; but it does not follow that the assessment for taxation must be the same as this value; on the contrary, we think the fair implication is, that the valuation of tangible property, otherwise assessed for taxation, should be deducted from the total value placed by the board of equalization upon the stock, and the remainder should be the basis of assessment for taxation. If this is not the right conclusion, the alternative is, that banks incorporated under the law of the State, besides being assessed upon the full value of their capital stock, were required, while this law was in force, to pay taxes upon their real estate, and perhaps other "tangible property;" and, by the very terms

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of the act of Congress, it was permissible to make the same exaction of National banks.

Section 62 is in terms applicable to any organized bank, whether State or National, and requires the shares of stock to be assessed to the owner thereof in the county, township, city or town where the bank is, and to be taxed at the same rate as other personal property in the same locality.

The 64th section requires of every bank or banking association contemplated by the 62d section, to "make out, in addition to other property required by this act to be listed, a statement, under oath, showing," etc. A comparison will demonstrate that the showing in reference to the valuation of the stock, and the basis for assessing the same, required by this section, is substantially different from the statement required by section 59, only in the omission of the requirement concerning tangible property; and this difference may be well nigh removed, without violence to the language, by holding that the phrase, "in addition to the other property required by this act to be listed," is in this connection the substantial equivalent of the sixth clause of the 59th section. The two sections are, however, irreconcilable in this, that, under section 64, the statement, instead of being placed before the board of equalization, must be delivered to the county auditor, who delivers a copy to the assessor, who lists and assesses the capital stock and makes return thereof as of similar property, except that it shall be treated as personal property belonging to banks or banking associations under the name of capital stock.

It is conceded that the stock of National banks must be taxed under section 64, because excluded in terms from the other sections; and it is suggested that the stock of banks incorporated under the laws of the State can not be taxed thereunder, because full and explicit provision for the listing and assessment of their stock is found in sections 59 and 62, and it can not be that assessments in both modes were intended. Conceding, without deciding, that this is the proper way to

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cut the irresolvable knot, we do not find it material to the present discussion. By either mode or by both modes of assessment, we think it clear, upon all the provisions of the law, that the real estate belonging to banks organized under the law of the State must be assessed as such in the county, township, town, or city where it is; and if section 64 is to be considered as standing by itself, and as the sole law of the State for the assessment of the capital stock of National banks—and this is the view most favorable to the appellee—and if in itself it means that the entire property, real and personal, should be considered in estimating and assessing the capital stock, we should still reach the conclusion that the real estate of such bank was properly assessed as such. The law of Congress is paramount; and it expressly forbids discrimination in favor of the banks of the State against the National banks; and notwithstanding, therefore, the letter of the statute of the State may require the assessment of National bank stocks at their full value, without deductions for real estate, the deduction being allowed in favor of other banks, under the law of Congress it must be allowed to the National banks. The law of the State is not entirely superseded, but, to this extent, must be regarded as modified by the act of Congress.

In this view, if any wrong was done the appellee, it was in an overvaluation of its capital stock—a fact which lends no support to this action. It is alleged in the answer, however, that the value of the realty was not included in the assessment of the stock; and, if this is so, the appellee suffered no injury whatever.

We conclude that the court erred in sustaining the demurrer to the answer, and should have carried it back to the complaint and sustained it to that. Judgment reversed.

HOWK, J., took no part in the consideration or decision of this cause.

The Traders Insurance Company v. Carpenter.

No. 10,050.

THE TRADERS INSURANCE COMPANY v. CARPENTER.

PRACTICE.—*Appeal.—Review of Judgment.*—The prosecution to final judgment of a complaint for review bars an appeal from the original judgment.

From the Vigo Circuit Court.

C. P. Jacobs and *C. S. Spritz*, for appellant.

S. M. McGregor, *I. N. Compton*, *G. A. Knight* and *C. H. Knight*, for appellee.

BICKNELL, C. C.—The appellee brought this suit against the appellant, upon a policy of insurance, and obtained a judgment therein by default.

The appellant filed a complaint for review for error of law only, to wit, that the complaint did not state facts sufficient to constitute a cause of action.

A demurrer to the complaint for review was sustained, and final judgment was rendered thereon in favor of the appellee.

Afterwards, the appellant took this appeal from the judgment by default, assigning the following errors:

1. In overruling the motion to set aside the judgment by default.
2. That the complaint does not state facts sufficient to constitute a cause of action.
3. That the court erred in rendering judgment against appellant.

The appellee answered the assignment of errors:

1. By the common joinder, *in nullo est erratum*.
2. By a special plea setting up the proceedings and judgment upon the complaint for review, and claiming that this appeal is thereby barred.

The appellant replied to this special plea, that, in said proceedings to review, the only error alleged and reviewed was the insufficiency of the complaint to constitute a cause of action; and that in said proceedings the appellant neither did

85	350
134	430
85	350
130	78
85	350
146	584

The Traders Insurance Company v. Carpenter.

nor could present to the court, for its consideration, the error first assigned in this court, to wit, overruling the motion to set aside the judgment by default; and that in said proceedings appellant did not present and could not have presented the affidavits necessary for such motion.

The question is, was the appeal barred?

In *Indiana Mutual Fire Ins. Co. v. Routledge*, 7 Ind. 25, it was held that a party who has prosecuted to final judgment, in the circuit court, a complaint for review, for error of law only, can not afterwards appeal from the original judgment to the Supreme Court, because the mode of procedure and judgment, upon such a complaint for review and upon an appeal, are in effect the same, and the law does not intend that a party shall have two revisions of the same case before two different courts, each sitting as a court of error.

So, in *Hardy v. Chipman*, 54 Ind. 591, it was held that such a bill of review is in the nature of an appeal from the judgment.

So, in *Richardson v. Howk*, 45 Ind. 451, *Rice v. Turner*, 72 Ind. 559, and *Tachau v. Fiedeldey*, 81 Ind. 54, it was held that a bill of review for error of law can not be sustained unless the error be such as would reverse the judgment on an appeal.

A party may appeal from the circuit court to the Supreme Court, or he may file in the circuit court a complaint for review, but the adoption of one of these remedies waives the other. *Dunkle v. Elston*, 71 Ind. 585; *Davis v. Binford*, 70 Ind. 44; *Hill v. Roach*, 72 Ind. 57; *Searle v. Whipperman*, 79 Ind. 424.

Of the assignments of error in this case, the third is too general, and presents no question. *King v. Wilkins*, 10 Ind. 216.

The second was presented and determined in the proceedings for review.

The first was not presented in the proceedings for review; the appellant claims, that, therefore, he may appeal and present it now; but it was proper to be presented, and might

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have been presented, in the complaint for review. *Ely v. Hawkins*, 15 Ind. 230.

The cases hereinbefore cited show, that appeals and proceedings for review for error of law are governed by like rules.

If on appeal no error is assigned upon a refusal to set aside a judgment by default, the error is regarded as waived, notwithstanding a proper exception was taken below. *Hollingsworth v. State, ex rel.*, 8 Ind. 257; *Starr v. Forbes*, 18 Ind. 433.

It follows that, in a complaint for review for error of law, all errors of law not presented must likewise be regarded as waived, and can not afterwards be made available.

The appeal in this case was barred by the previous prosecution to judgment of the complaint for review. It ought to be dismissed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the appeal herein be and it is hereby dismissed, at the costs of the appellant.

 No. 9601.

THOMPSON v. SHEPARD.

MECHANIC'S LIEN.—*Married Woman.*—*Husband and Wife.*—Where a married woman, owning a city lot, mortgaged it to raise money to improve it by the erection of a house thereon, the husband taking the money, and, with her knowledge and consent, erecting the building, employing another to plaster it, the necessary inference follows that the husband was either her agent or a contractor to build the house, and in either case the statute gives the plasterer a right to a mechanic's lien, by recording the proper notice.

From the Porter Circuit Court.

E. D. Crumpacker, for appellant.

A. D. Bartholomew and ——— *Smith*, for appellee.

85	352
138	177
85	352
162	265

Thompson v. Shepard.

MORRIS, C.—This suit was commenced by the appellant against the appellee to foreclose a mechanic's lien.

The complaint states that the appellee is the owner of lot No. 2, in block 25, in Woodhull's addition to the city of Valparaiso, Porter county, Indiana ; that during the summer of 1880, for the betterment and improvement of said lot, she erected thereon a frame house ; that her husband, Thomas C. Shepard, being a carpenter and joiner, conducted and superintended the construction of said building as the contractor and agent of the appellee ; that, with the knowledge and consent of the said appellee, her said husband, as such contractor and agent, employed the appellant to plaster said house ; that he performed said labor pursuant to a contract between him and the appellee's said husband, and with her knowledge of, and consent to, the same ; that the appellee is indebted to the appellant for said labor and plastering in the sum of \$46.50, which is due and unpaid ; that on the 19th day of November, 1880, and in less than sixty days after the completion of said work, the plaintiff filed in the recorder's office of Porter county, Indiana, a notice of his intention to hold a lien on said real estate for the sum so due, a copy of which lien is filed with said complaint ; that said notice was recorded in the mechanic's lien record on the 19th day of November, 1880. Prayer that said real estate may be sold and the proceeds applied to the payment of said lien.

The appellee demurred to the complaint for want of facts. The court overruled the demurrer.

The appellee answered the complaint in two paragraphs, the first being the general denial. The second paragraph alleged payment of \$20. The appellant replied in denial to the second paragraph of the answer.

The cause was submitted for trial to the court, who found for the appellee.

The appellant moved for a new trial on the ground that the finding of the court was not supported by sufficient evidence

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and was contrary to law, and because the court refused to permit him to prove by Thomas C. Shepard, the husband of the appellee, that, before and during the construction of said building, the appellee frequently gave the witness instructions and directions in regard to the construction and arrangement of said building.

The overruling of the motion for a new trial is assigned as error.

The testimony showed that the appellee was the owner of the lot upon which the house was erected, and that she and her husband, on the 21st day of February, 1880, executed a mortgage on the same to one Henry Hansen for the sum of \$400. It also showed that the appellant had filed and caused to be recorded, within sixty days from the completion of the work mentioned in the complaint, a notice of his intention to hold a lien on said real estate for the sum of \$46.50 for work and labor done on the house erected on said real estate.

The plaintiff testified as follows: "I am the plaintiff in this action; I am a plasterer and bricklayer; I plastered the house for the defendant on the property in question; Thomas C. Shepard did the carpenter work, and employed me to lay the foundation, build the chimneys and do the plastering; I agreed to lay the foundation and build the chimneys in payment of a grocery bill, which I did; I was to have ten cents per yard for doing the plastering; the plastering amounted to \$51.62; they paid my tender, who was the defendant's brother, \$5; this left \$46.62 due me; it is all now due and unpaid; I finished the work the last of September or first of October, and filed the lien within fifty days after the work was done; I don't know as I knew that Rosanna Shepard owned the property when I commenced work; I did while doing the work."

The appellee testified that she owned the property in controversy; that her husband was a carpenter and joiner by trade; that he built a house on said lot last year; that he did the building; that she knew the house was being built; that

Thompson v. Shepard.

she mortgaged the property for \$400 to construct the building; that her husband took the money and built the house; that it was a dwelling-house, and that she went down to the building occasionally while it was in process of construction. She further testifies: "I gave no direction in regard to it; we built the house to live in or rent as we saw fit; I am not acquainted with the plaintiff; I employed no one to work on the building, nor did I authorize my husband to; the plaintiff sent me notice to pay his claim or he would file a lien on the property."

Thomas C. Shepard, the husband of the appellee, testified as follows:

"I built the house myself, individually; I employed the plaintiff to do the plastering; he agreed to do it for eight cents per yard; his whole bill came to \$51.62; I paid him \$16—\$11 in groceries and \$5 in cash; I had a settlement with the plaintiff since the work was done, and we agreed on \$34.62 as the amount due him; of course the defendant knew I was building the house."

We think the testimony in the case established the following facts:

1. That the appellee is the owner of the lot and house in controversy, and was the owner of the lot before and during the time the house was being built.

2. That she raised \$400 and gave a mortgage on the lot to secure it.

3. That her husband, with her consent, took the \$400 to build the house, and that, during its erection, she went and looked at the work, but gave no direction concerning it.

4. That she did not personally employ the appellant to work upon it, nor expressly authorize her husband to employ him.

5. That the appellant, upon a contract made with the husband of the appellee, who was a carpenter and did all the work upon the house except that which was done by the appellant, agreed to and did plaster said house, the husband agreeing to pay him for said work.

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6. That within the proper time the appellant filed, and caused to be recorded in Porter county, a notice, in due form, of his intention to hold a lien upon said lot and building for the amount due him for his work.

The testimony, fairly construed, establishes the above facts; and from these facts, it seems to us, the inference follows that the house was built by the husband of the appellee for her, either as her agent or for the \$400 as a contractor. The facts that she was the owner of the land on which the house was built, and that she furnished \$400 with which to build it, not only forbid the idea that it was built by the husband voluntarily and without her consent, but compel the conclusion that it was built by him for her, pursuant to an understanding and arrangement with her, by which he was to construct the building for the \$400, or, as her agent, take the money and erect the building for her.

If, as her agent and employee, the husband put up the building, and, in doing so, employed the appellant to plaster the house, agreeing to pay him so much for his work, the appellant is entitled to a mechanic's lien for the value of his work. This right is given by the statute, in addition to his right, secured by his contract with the husband, to look to him for pay. *Jones v. Pothast*, 72 Ind. 158; *Shilling v. Templeton*, 66 Ind. 585; *Vail v. Meyer*, 71 Ind. 159. Neither the fact that the contract was made with the husband, nor the fact that the latter was to pay for the work personally, will justify the inference that the appellant had abandoned the additional right to a lien given him by the statute.

If we regard the husband as having agreed to erect the house for the \$400 paid by the appellee, still the appellant, having performed labor on the house, would be entitled to a lien. He who furnishes materials or performs labor for a contractor, though at his instance and upon his promise to pay, is entitled to a lien for his materials furnished or his labor performed. *Andis v. Davis*, 63 Ind. 17; *Crawford v. Crockett*, 55 Ind. 220. We think that the testimony tended to prove

Bitting *et al.* v. Ten Eyck.

and satisfactorily establish the facts stated above, and that there was no testimony legally tending to prove the contrary.

The court erred in overruling the motion for a new trial.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the appellee's costs.

No. 8853.

BITTING ET AL. v. TEN EYCK.

RECEIVER.—*Power to Appoint.*—The courts of this State, under the code, have the same power, for the same purposes and under the same emergencies, to appoint receivers, as had the courts of equity before the adoption of the code.

SAME.—*Action of Ejectment.—Crops.*—In an ejectment suit, it is no objection to an application for a receiver to take charge of the crops, that no reason is shown why the action can not be speedily tried and the rights of the parties thereby saved.

SAME.—*Practice.—Jury Trial.—Change of Venue.*—The appointment of a receiver, in a pending action, is made by the court upon motion without the formation of issues, and without the aid of a jury, the evidence consisting of the verified application and such affidavits and depositions as the parties may offer. An application for a change of venue from the county does not affect the power of the court to make the appointment.

SAME.—*Pleading.—Practice.*—An unsworn denial is not a good answer to an application for the appointment of a receiver in a pending action, and may be stricken out on motion; the sustaining of a demurrer to such answer is not available error.

PRACTICE.—*Change of Judge.—Record of Appointment of Other Judge.*—When a change is taken from the presiding judge, and another judge is called, the latter may proceed in the case before the record of his appointment has been made up and signed.

SAME.—*Ejectment.—New Trial as of Right.—Waiver of Exceptions.*—By taking a new trial, in an action of ejectment, as a matter of right upon payment of costs, the party waives exceptions to rulings made at the trial had.

SAME.—*New Parties Admitted After First Trial.*—When, in an action of ejectment against one, the defendant had taken a new trial as matter of

85	357
184	604
85	357
142	326
142	527
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150	285
85	357
156	580

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right, and thereupon others were made defendants upon their own motion, and a second trial had, the new parties were not entitled to a new trial as of right.

EVIDENCE.—*Witness.—Competency of Party.*—The plaintiff in ejectment had contracted in writing for the sale of the land to the defendant, and upon a decree of foreclosure of his lien as vendor had repurchased the land and had obtained the sheriff's deed; and the children of the principal defendant, having been admitted to defend, set up that the contract of sale, though made in the name of their father, was for the benefit of their mother, who was not made a party to the foreclosure, and that as her heirs they had her rights.

Held, that there was no error in permitting the plaintiff to testify concerning the possession of the premises by the principal defendant before the commencement of the action.

From the Tippecanoe Circuit Court.

R. Jones, J. L. Miller and B. W. Langdon, for appellants.
F. B. Everett and J. M. Larue, for appellee.

WOODS, J.—The appellee brought, in the Superior Court of Tippecanoe County, an action of ejectment against the appellant Francis L. Bitting, who answered by a general denial. The appellee then filed a verified supplemental complaint, asking the appointment of a receiver to take charge of and sell the crops on the land, and hold the proceeds under the order of the court.

Thereupon the defendant filed an application for a change of venue from the county, which motion the court ordered granted as to the principal action, but did not designate the county to which the change should be, until after disposition of the application for the appointment of a receiver.

The defendant then filed an application for a change of judge, and for a change of venue from the county in respect to the supplemental complaint. The change of judge was granted, and the judge of the Tippecanoe Circuit Court was appointed, and proceeded to hear the application for a receiver. Before the judge so called in, the defendant renewed his motion for a change of venue from the county, and, this and his demurrer to the application for the appointment of a receiver having been overruled, he answered the application

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by a general denial (not sworn to), and demanded a jury trial, which was denied him.

The appellee demurred to the answer, the court sustained the demurrer, and, upon the sworn application and upon affidavits read by either party, ordered the appointment of a receiver, who qualified by giving bond to the court's approval.

The venue in the principal case was then changed to the Benton Circuit Court, where a trial was had, and judgment was given for appellee for the recovery of the property, and for damages for the detention to the date of the judgment, assessed at \$100, together with costs.

Within the year the defendant paid into court the damages and costs, and was granted a new trial as a matter of right, under the statute. Thereupon the children and co-appellants of the said defendant moved the court for an order upon the plaintiff to make them defendants, which motion, over the objection and exception of the plaintiff, the court sustained; and the plaintiff accordingly filed an amended complaint, making them parties defendants.

The venue of the case was then changed to Jasper county, and thence, afterwards, by agreement, to the Tippecanoe Circuit Court, where a trial had at the April term, 1880, resulted in a second finding and judgment for the appellee, the damages for the detention being assessed at \$566.60, and it being ordered as a part of the judgment that the \$100, before paid into court on the application for a new trial as of right, be applied on the damages so finally assessed.

The defendants joined in a motion for a new trial, for reasons stated; and those who were made defendants after the first trial moved for a new trial as a matter of right, not paying the costs, but alleging that no costs or damages had been adjudged against them.

Exceptions were taken to the various rulings of the court, which have been recited, and to other rulings to be stated in their proper order; and it is now insisted that the court erred in overruling the demurrer to the supplemental complaint for

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the appointment of a receiver; in sustaining the demurrer to the answer to that complaint; in compelling the defendant to answer after an affidavit had been filed for a change of venue and a change granted; in refusing a change of venue in reference to the appointment of the receiver; and in refusing a jury trial upon that application.

The only objection pointed out by counsel to the application for a receiver is, that "no reason is shown why the original case could not be tried and all the rights of the appellee saved by a trial of the original cause." But this is an impracticable objection. It can not be anticipated, as the history of this case strongly illustrates, when a pending action may be brought to trial. A party may need, and upon a proper showing may have, a receiver for the purposes of a short as well as for a protracted litigation.

The appointment of a receiver is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it. From the very nature of the power and of the purposes for which it may be invoked, its efficiency depends on the promptness with which it may be exercised. The same power is conferred by the code upon the courts of this State, to be exercised for the same purposes and in the same emergencies, as in the courts of equity before the adoption of the code. *Connelly v. Dickson*, 76 Ind. 440. And it is plain that the formation of issues and the intervention of juries for their trial, at least in cases of interlocutory applications for such appointments, were not contemplated. The principle, in ordinary practice, is to appoint a receiver with the sole view of preserving the property, and not to inquire into the merits. It is done upon motion, the evidence heard being the sworn pleadings of the parties, and such affidavits or depositions as may, within the rules of practice, be offered on either side. *Edwards Receivers*, 13-22, 76-85; *Kerr Receivers*, 134-144; *High Receivers*, 62-79.

There was, therefore, no error in sustaining the demurrer

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to the general denial of the application, though it would have been a better practice to have reached the same result by means of a motion to strike out or to reject.

It follows, too, that it was proper to dispose of the application before the perfecting of the change of venue from the county.

The objection is made, that the judge who was called in to dispose of the application, after a change had been taken from the regular judge, proceeded at once, before the record of his appointment had been entered and signed. We see no force in the objection.

Before asking for a new trial as a matter of right, in the Benton Circuit Court, the defendant moved for a new trial for cause, and now complains that this was not granted.

Besides the manifest insufficiency of the alleged cause, the defendant waived any question concerning the ruling, by taking a new trial as of right. The taking of a new trial under the statute necessarily eliminates from the record all errors which may have intervened at the trial had. If the party would avail himself of such errors, he must abide by the rulings, permit judgment to go, and take his appeal.

There was no error in refusing a second trial as a matter of right, on the motion of the defendants who came into the case after the first trial. They came in of their own choice, against the protest of the plaintiff, and must be considered as having elected to abide by the result of the case as if they had been in from the beginning. *Crews v. Ross*, 44 Ind. 481.

If they had been brought in by an amendment made upon the plaintiff's own motion, we might reach a different conclusion, for if, in such case, the new party were denied the right to a second trial, the plaintiff might purposely omit bringing the real defendant into the case until after a trial had been had, in order to deprive him of this important safeguard against surprise or undue advantage taken of him in a single trial. We decide nothing, however, on this point.

It is next insisted that the admission of the testimony of

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the appellee was erroneous, because the infant defendants claimed title from their mother, who had died, and that, consequently, the plaintiff was not a competent witness against them.

It is a sufficient answer that the appellee's action was not founded on a contract with or demand against the deceased mother, but upon a sale made upon the foreclosure of a vendor's lien against the father, the original defendant in the case, against whom the testimony was clearly competent. It was the claim of the children, or the claim made for them, that the written contract which purported to be between the appellee and their father was in fact a contract with their mother for the sale of the property by the appellee to her, and, consequently, that the foreclosure and sale against their father did not cut off their rights as heirs of the mother. The interposition of this defence by them, contrary to the terms of the writing, could not deprive the appellee of the right, upon his own theory of the case, to testify as to what occurred between him and the father in reference to the possession of the property after the death of the mother, and before the bringing of the action.

We find no error in the record. The judgment is, therefore, affirmed, with costs.

Opinion filed at the May term, 1882.

Petition for a rehearing dismissed at the November term, 1882.

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183 120

85 362
160 895
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160 400

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166 243
168 696

No. 8076.

ÆTNA INSURANCE COMPANY v. SHRYER ET AL.

INSURANCE.—*Waiver of Conditions.—Agent's Authority.*—An adjusting agent of a fire insurance company to whom a loss is referred by the company, with authority to manage and control it until it is disposed of, has authority to waive the preliminary proofs of loss which the policy requires to be made to the company; and if he place a refusal to pay the loss wholly upon other grounds, it is a waiver of the right to defend a suit on the ground that such proofs were not made.

From the Greene Circuit Court.

Ætna Insurance Company v. Shryer et al.

W. H. De Wolf and S. N. Chambers, for appellant.

A. G. Cavins, E. H. C. Cavins, W. I. Baker, L. Shaw, W. M. Franklin, J. D. Alexander and H. W. Letsinger, for appellees.

ELLIOTT, J.—The controlling question in this case is, whether the agents of the appellant waived the formal proofs of loss required by the policy of insurance upon which rests the judgment of the appellees against the company.

Involved in this general question is the enquiry, whether the persons by whom the waiver is asserted to have been made, were authorized to waive preliminary proof of loss. It is not every agent of an insurance company that has authority to waive performance of the conditions of the policy, and the authority to make such a waiver can not be inferred from the mere fact that the person alleged to possess such authority does in some matters represent the company. The existence of the relation of principal and agent is not sufficient to warrant the conclusion that the agent possessed authority to waive the conditions of the contract of insurance.

The agent, whose acts are chiefly relied on as waiving the preliminary proofs, was the adjuster of the company, whose general duty was to adjust and report losses to the principal officers of the corporation. There is much diversity of opinion as to whether an adjuster has authority to waive preliminary proof. It would seem that the better reason is with the cases which hold that he has; for a company that sends an agent to ascertain the nature, cause and extent of the loss, and employs him in that particular line of duty, may well be deemed to have invested him with a general authority in all such matters. But we are not required to decide whether an adjusting agent has, by force of his position alone, authority to waive preliminary proofs of loss, for there are facts disclosed in the evidence tending to show that the adjuster had, in this instance, a much broader scope of authority than that usually bestowed upon adjusting agents. It appears that there was a default

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taken against the appellant; that, upon the hearing of the motion to set it aside, the company produced the affidavit of Stewart, the adjuster, wherein he deposed, that "When a case is referred to this affiant for adjustment, he assumes the charge, management and control thereof, and so retains the same until the matter is finally disposed of; and, if litigation ensues in any case so referred to this affiant, it is also his duty to take charge of the management thereof, subject to the general supervision and instruction of F. C. Bennett, general agent, at Cincinnati." By filing this affidavit in support of its motion to set aside the default, the appellant adopted the statements of the paper, and can not be permitted to now deny their truth. It would be inequitable to permit a party to secure relief from a judgment upon the faith of statements contained in an affidavit, and allow him to afterwards impeach their truth. Taking the statements of this affidavit in connection with the other evidence, we think there is enough to support the finding that the adjuster had authority to waive the preliminary proof of loss. . *Willcuts v. Northwestern, etc., Ins. Co.*, 81 Ind. 300; *Phœnix, etc., Ins. Co. v. Hinesley*, 75 Ind. 1. In *Brink v. Merchants, etc., Ins. Co.*, 49 Vt. 442, it was said: "Evidence was given to show that Lester was an agent of the defendant, specially authorized in writing to settle this loss. His declarations in the course of the discharge of such duty, might properly be shown in evidence." In still more explicit terms, the rule is laid down in *Little v. Phœnix Ins. Co.*, 123 Mass. 380 (25 Am. R. 96), where it was said, in speaking of agents authorized to adjust a loss: "There was evidence that they were charged with the whole duty of settling the loss, and in this respect represented the company. As a necessary incident, they had power to dispense with those stipulations for the benefit of the company, which had reference to the mode of ascertaining the liability and limiting the right of action. *Eastern Railroad v. Relief Ins. Co.*, 105 Mass. 570. *Kennebec Co. v. Augusta Ins. Co.*,

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6 Gray, 204. *Gloucester Manuf. Co. v. Howard Ins. Co.*, 5 Gray, 497."

The fact that the conditions respecting the preliminary proofs are written in the contract of insurance does not prevent their waiver by an authorized agent of the insurer. This principle is involved in the cases cited from our own reports, and in the cases of *Masonic, etc., Ass'n v. Beck*, 77 Ind. 203, S. C., 40 Am. R. 295, and *Byrne v. Rising Sun Ins. Co.*, 20 Ind. 103; and is recognized in many well considered cases. *Rokes v. Amazon Ins. Co.*, 34 Am. R. 323; *Carson v. Jersey City Ins. Co.*, 14 Vroom, 300; S. C., 39 Am. R. 584; *Blake v. Exchange M. Ins. Co.*, 12 Gray, 265; *Priest v. Citizens' M. F. Ins. Co.*, 3 Allen, 602; *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; S. C., 11 Am. R. 469.

We are satisfied that there was evidence warranting the jury in inferring that the adjuster had authority to waive the preliminary proofs of loss, and our next enquiry is whether there were such acts done by him as justly warranted the inference that there was a waiver.

It is agreed by all the text-writers and courts, that there may be an implied waiver, and that it may be inferred from facts and circumstances. The evidence before us shows that the adjusting agent of the company visited the place where the loss occurred; that the insured furnished him with a list of the losses; that the agent went away from the place, saying that he would return in a few days; that he did not return, but wrote a letter wherein he asked for information as to the quantity of some of the articles claimed to have been manufactured by the insured and burned; stated what he had ascertained to be the value of the tobacco included in the loss; expressed his belief that some of it had been stolen before the fire; objected that the ownership of the building destroyed was not "absolute in the insured," and wound up by stating: "I shall place the case in this light before the company, and, if they will agree to it, there would be payable on

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building, \$400; on machinery and fixtures, \$133.33; stock as before stated, \$910.75; in all, \$1,444.08."

This letter was written on the 24th day of January, 1878, and, in answer to a letter from the insured, the adjuster wrote again on the 22d of February of the same year. In this last letter no mention was made of the failure to make proof of loss; but among other things it was said: "I have spoken to our manager to-day about it, and whilst they think there is no legal liability, I think they can be induced to agree to my proposition of considering the equities due to the two Messrs. Jamison, on their insurance on all that part of the risk, making the loss as per my statement, \$1,444.08." It appears very clearly that no objection was made to the statements of the loss furnished the adjuster, and that payment of the loss was withheld upon entirely different grounds, namely, that the tobacco had been stolen before the fire, and that the ownership of the property had not been correctly stated in the application.

There are at least two reasons why this evidence should be regarded as proof of waiver. The first of these is that the insured had given the adjuster a statement, and this, although not verified as the policy required, nor in the form prescribed, was accepted and treated as sufficient. Where preliminary proof is made which is defective, the insured, by treating it as sufficient, waives all objections to its sufficiency. The rule is well stated in a late work: "If the insurers intend to insist upon defects in the preliminary proof, they should indicate their intention in such a way that the insured may not be deceived into a false security, and at such time that he shall have opportunity to supply the defects." *May Insurance*, sec. 468. It is also said by this author, citing *Harris v. Phoenix Ins. Co.*, 35 Conn. 310, that "It is to be observed, that it is the duty of the insurers, pending the consideration of the proofs of loss, to bear themselves with all good faith towards the claimant, and if they are dissatisfied with the proof furnished, and have, or have not, the right to demand further

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proof before their liability becomes fixed, they ought to make known to the assured the fact and the nature of these demands without unnecessary delay. Otherwise they will be held to have waived their rights in this regard." The doctrine of the case from which we have quoted is substantially the same as that of our own case of *Byrne v. Rising Sun Ins. Co.*, *supra*.

Another reason for holding that the appellant waived the preliminary proof of loss is that payment was withheld upon other and different grounds. The objections were, as we have seen, not that proof had not been made, but that there were other grounds which vitiated the insurance. The writer from whom we have quoted says: "Thus, where the insurers refuse to pay on special grounds, as that the contract was never completed, or that the insured had no interest, or on any other grounds having no reference to the sufficiency or insufficiency of the preliminary proof, it is a waiver of their right to object to any deficiency in this particular." At another place this author says: "So if the insurers decline to pay without giving any reason upon which to rest their refusal, such a refusal, by necessary implication, gives the assured to understand that the production of preliminary proof will be useless,—an idle ceremony, which the law will not require him to perform. So, if the refusal to pay is upon the ground that the property lost was not included in the risk, or that the assured has forfeited his right to recover by fraud." May Insurance, secs. 468, 469. Many cases are cited in support of the text, to which may be added, *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Graves v. Washington M. Ins. Co.*, 12 Allen, 391; *Pennsylvania F. Ins. Co. v. Kittle*, 39 Mich. 51; *Farmers' M. Ins. Co. v. Taylor*, 73 Pa. St. 342; *Farmers', etc., Ins. Co. v. Meckes*, 12 Reporter, 314; *Farmers' M. F. Ins. Co. v. Moyer*, 97 Pa. St. 441.

The cases of *Home Ins. Co. v. Duke*, 43 Ind. 418, and *Protection Ins. Co. v. Pherson*, 5 Ind. 417, have no application to the present case, for no question of waiver was involved in either of them. All that is decided in the case of *Peoria*,

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etc., *Ins. Co. v. Walser*, 22 Ind. 73, that bears in the remotest degree upon the present, is that the simple direction of the agent to one of the crew of the boat, to go before an officer and make a protest, was not a waiver of the legal rights of the company to a legal protest in the case, and this, it is plain, can have here no controlling force.

The doctrine that an insurance company, by putting its refusal to pay the loss upon a definite ground different from a want of preliminary proofs, or of defect in their form or substance, waives the right to insist upon the failure to make such proof as a defence to an action on the policy, is in harmony with the elementary principle that a party, who places his refusal upon one ground, can not, after action brought, change it to another and different one. *Hanna v. Phelps*, 7 Ind. 21; *Turner v. Parry*, 27 Ind. 163; *Bartlett v. Adams*, 43 Ind. 447; *Blair v. Hamilton*, 48 Ind. 32; *Emlden v. Augusta*, 12 Mass. 307; *Gerrish v. Norris*, 9 Cush. 167. There is no reason why this rule should not apply to policies of insurance as well as other contracts.

We can not disturb the verdict upon the ground that it is contrary to the evidence, for it is supported upon all material points by some evidence.

Judgment affirmed.

No. 8331.

EMBREE ET AL. v. THE STATE, EX REL. FEDERER.

DECEDENTS' ESTATES.—*Administrator.*—*Suit on Bond.*—*Parties.*—*Evidence.*—

Conversion.—In a complaint on the bond of a deceased administrator, on the relation of a creditor, alleging, as breaches, failure to pay the creditor's claim, conversion of the assets, and failure to settle the estate in proper time, neither other unpaid creditors nor the administrator of the deceased administrator are necessary parties, nor is proof of a demand and failure to pay sufficient proof of a conversion of the assets.

From the Gibson Circuit Court.

Embree et al. v. The State, ex rel. Federer.

J. E. McCullough and L. C. Embree, for appellants.

R. M. J. Miller, for appellee.

NIBLACK, J.—This was an action by the State, on the relation of a creditor, against the sureties upon an administrator's bond.

The complaint charged that, on the 24th day of November, 1873, one Thomas Cole was appointed administrator of the estate of Jacob Lyles, deceased, and that he, with the defendants Milton P. Embree and Thomas N. Milburn as his sureties, executed a bond conditioned for the faithful discharge of his duties as such administrator; that thereupon Cole duly qualified as the administrator thereof, and took upon himself the administration of said estate; that, on the 15th day of January, 1874, Frederick C. Federer & Co. filed two claims against the estate, one based on a note for \$22.40 and the other consisting of an account for \$17.80, both of which claims were duly allowed by Cole, administrator, as above stated; that certain other creditors of the decedent also filed claims against the estate, amounting in the aggregate to the sum of \$500.00, all of which claims were also allowed in due course of administration; that sufficient assets came into the hands of Cole to pay all claims against the estate; that the relator, Frederick C. Federer, is the surviving partner of the firm of Frederick C. Federer & Co.; that Cole had died, leaving an insolvent estate.

The breaches assigned were:

First. That Cole, though often requested, had continuously failed and refused to pay the claims due from, and had unjustly neglected and refused to pay any of the debts against, the estate.

Second. That Cole had converted the entire assets of the estate to his own use.

Third. That Cole had for four years neglected to pay the claims against the estate, and had unlawfully failed and re-

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fused to make final settlement of his trust as the administrator thereof, to the damage of the relator in the sum of \$60, and of the other creditors in the sum of \$500.

The defendants answered in three paragraphs:

1. In general denial.
2. In abatement, alleging the names of four other creditors of the estate, residents of Gibson county, who it was claimed, ought, also, to have been made relators in the action.
3. Also in abatement, alleging the name of the administrator of Cole's estate, who, it was averred, also resided in Gibson county, and ought to have been made a co-defendant in the action.

Demurrers were sustained to the second and third paragraphs of the answer. A jury returned a verdict for the plaintiff, assessing the damages at \$403.35. Answers to certain interrogatories addressed to the jury made it appear that the entire amount of the damages had been assessed upon the second breach assigned in the complaint.

A motion for a new trial being first denied, judgment was rendered in favor of the plaintiff for the damages assessed by the jury. Error is assigned upon the sustaining of the demurrer to the second and third paragraphs of the answer, and upon the overruling of the motion for a new trial.

In cases like this the usual and better method of proceeding is to have an administrator *de bonis non* appointed, and to allow him to recover the assets of the estate unadministered, and to settle the estate in due course of administration.

In that way complications may be avoided, which are liable to arise where the creditors only sue upon the bond of a deceased or former administrator. But where an administrator has been guilty of a breach of his bond, a suit may be maintained against him and his sureties, or, in a proper case, his sureties alone, on the relation of any creditor of the estate, meaning thereby any creditor who has been injured by the misconduct of the administrator. In case of a recovery, the judgment ought to be in the name of the State, and in such a

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way as to make it inure to the benefit of the estate generally, and not to any particular creditor, and the damages, when collected, after allowing the relator a compensation, shall be paid into court, to be disposed of according to law. 2 R. S. 1876, p. 549, sections 162, 163, 164. A right of action is thus secured to any injured creditor of an estate where the administrator has become liable upon his bond. Hence, the second paragraph of the answer did not contain facts sufficient to abate the action, and the court did not err in sustaining the demurrer to that paragraph.

The administrator of Cole might have been made a party defendant to the action, but it was not necessary that he should have been. *Braxton v. State, ex rel.*, 25 Ind. 82; *Stanford v. Stanford*, 42 Ind. 485; *Milam v. Milam*, 60 Ind. 58.

There was consequently no error in sustaining the demurrer to the third paragraph of the answer.

One of the causes assigned for a new trial was that the verdict was not sustained by sufficient evidence.

The attorney for the relator testified that, in the latter part of the year 1877, he, on behalf of his client, twice demanded of Cole, as the administrator of the estate, payment of the claims of Frederick C. Federer & Co., but that Cole did not pay the claims. Another creditor of the estate testified that he had several times demanded payment of his claim of Cole, but that Cole did not pay it. This was all the evidence which could have been construed as tending to show a conversion of the assets in his hands by Cole as charged in the complaint. This was not sufficient to establish a conversion of the assets by Cole to his own use.

When personal property has been tortiously taken, or unlawfully detained, a demand for its possession by the owner, supplemented by a refusal to return or deliver up the property, is usually accepted as sufficient evidence to prove a conversion of the property so taken or detained; but more than a demand and a refusal to pay must be shown, to establish a conversion in a case like this, where the administrator is the

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lawful custodian of the assets, and where no specific article of property is sued for. Something more palpable than a mere delay in the payment of a claim against an estate must be proven to make out a case of conversion of the assets. 3 Wait's Actions and Defenses, 256. For aught that was made to appear by the evidence, the assets unadministered by Cole are still in existence awaiting the appointment of another administrator, or ready to be delivered to whomsoever may be entitled to receive them.

In our opinion, therefore, the verdict was not sustained by sufficient evidence.

The judgment is reversed, at the costs of Federer, the relator, and the cause remanded for a new trial.

Embree, one of the appellants, having died since this cause was submitted, it is ordered that the judgment of reversal in this cause shall be entered as of the November term, 1879, of this court, during which the submission was made.

No. 9655.

EPSTEIN v. GREER.

LANDLORD AND TENANT.—*Rent.*—*Former Adjudication.*—In a suit by a landlord for rent and possession, an answer of former adjudication is well met by a reply that the pending action is for rent accrued since the former trial.

SAME.—A tenant holding possession as such can not, as against his landlord, deny the title of the latter and thereby avoid paying rent.

From the Dearborn Circuit Court.

J. D. Haynes and *J. K. Thompson*, for appellant.

H. D. McMullen and *D. T. Downey*, for appellee.

FRANKLIN, C.—Appellee as landlord sued appellant as tenant before a justice of the peace, for the possession and rent

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of a house and lots in the town of Aurora, in said county, alleging the non-payment of rent, and notice to quit.

The case was tried before the justice, and judgment was rendered for the plaintiff. The defendant appealed to the circuit court, where he filed an answer in three paragraphs: 1st. A denial. 2d. Insanity of the plaintiff's grantor. 3d. Former adjudication. A demurrer was sustained as to the second and overruled as to the third paragraph. Reply to the third paragraph that the former suit was for rent that had previously accrued, and that this suit was for rent that had accrued since the former trial. A demurrer was overruled to the reply. There was a trial before the court and a finding for the plaintiff in the sum of \$65 damages. A motion for a new trial was overruled, and judgment was rendered for the plaintiff for that amount, and that he have possession of the premises. The defendant appealed to this court, and has assigned for errors the sustaining of the demurrer to the second paragraph of his answer, the overruling of his demurrer to the reply, and the overruling of his motion for a new trial.

The second paragraph of the answer is bad. A tenant cannot, while retaining the possession, deny the title of his landlord and thereby defeat the payment of rent. *Epstein v. Greer*, 78 Ind. 348.

Appellee has furnished no brief, and appellant has furnished us no authority upon his demurrer to the reply. We see no real objections to the reply.

There was no error in sustaining the demurrer to the second paragraph of the answer, nor in overruling the demurrer to the reply.

The reasons stated for a new trial are:

That the finding of the court is not sustained by sufficient evidence, is contrary to law, and the damages are excessive.

The evidence for the plaintiff shows that on the 24th day of March, 1881, appellee had served upon appellant a written notice to quit possession, unless the rent due was paid in ten

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days from that time. The defendant refused to pay the rent unless the house was repaired.

This suit was commenced on the 4th day of April, 1881. The defendant lived in the property, and had contracted with the plaintiff to pay \$5 per week rent. This contract was made in July, 1880. Since March 15th, 1881, no rent has been paid. That there was no contract to repair.

The evidence on the part of the defence shows:

That the plaintiff, on the 27th day of November, 1880, commenced a former similar suit before a justice of the peace, to collect the rents then due, and for possession of the premises, which was decided by the justice in favor of the plaintiff; the defendant appealed that case to the circuit court, where it was tried before the court, and a finding made for the plaintiff in the sum of \$85; and, over a motion for a new trial, judgment was rendered for said sum and the possession of the premises. (This judgment was rendered March the 14th, 1881, and was by the defendant appealed to this court and reported in 78 Ind., *supra*.) In addition to the transcript of the former case being given in evidence, there was parol evidence given, showing that the appeal in the former case to this court had been perfected, which was all the evidence given in the cause.

The former adjudication could only include the rents up to the time of the trial, and the unlawful holding of possession up to that time. It certainly did not embrace rents accruing after the day of trial, or determine that the holding of possession thereafter would be lawful. The court adjudged that the holding of the possession up to that time was unlawful, and if the defendant desired to relieve himself from the subsequent liability to pay rent, he could have done so by surrendering the possession of the premises to the plaintiff, as the court had determined. He can not disregard the former judgment, in so far as he is concerned, and at the same time enforce it as to the plaintiff. But the bond filed on the ap-

Epstein v. Greer.

peal to this court from the former judgment does not include the rents that would accrue between the times of taking the appeal and a decision of the case by this court. That bond was only conditioned that appellant should duly prosecute his appeal to effect, and abide by and pay the judgment and costs which might be rendered or affirmed against him. *Malone v. McLain*, 3 Ind. 532. And as the rents in controversy could not be included in such judgment or affirmation, there was no former adjudication of them, or of pending litigation in relation to them, at the commencement of this suit.

The failure to pay rent after the former trial was a subsequent breach of the contract to pay rent, and the unlawful holding over was a continuous injury, for which the former suit could not be a bar as *res adjudicata*. Wells Res Adjudicata, section 276. We think the proof failed to establish the defence of *res adjudicata*, to the matters embraced in this suit; that the evidence supports the finding of the court; and that it is not contrary to law.

The third reason for a new trial is, that the damages are excessive.

The former judgment was rendered March 14th, 1881; the judgment in this case was rendered June 14th, 1881, making thirteen weeks between them; at \$5 per week, according to the rate of the contract in the beginning, the rent would amount to \$65, the amount of the finding by the court. The damages are not excessive.

There was no error in overruling the motion for a new trial.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

No. 9361.

HEATON v. WHITE ET AL.

FRAUDULENT CONVEYANCE.—*Estoppel.—Husband and Wife.*—Suit by a judgment creditor to reach real estate, alleged to have been conveyed by the debtor through another to the debtor's wife to defraud the creditor, and by the wife to W., with notice. Answer in estoppel, that the creditor, while the wife held title and because thereof, had taken the wife's note. *Held*, that the answer was bad.

SAME.—*Trust.*—A further answer, that title to another tract of land, which had been paid for mostly by the money of the wife, had been conveyed to the husband upon his parol agreement to hold it in trust for the wife, and that the land in controversy was paid for by the proceeds of that tract, and the conveyance taken to the husband before the indebtedness accrued, upon his parol agreement to hold in trust for the wife, and that she had invested her own funds in improving the land, and denying all fraud, was held good on demurrer.

PRACTICE.—*Bill of Exceptions.—When Filed.*—Where, prior to 1881, on overruling a motion for a new trial at a term succeeding that of the trial, the bill of exceptions was filed within a time then given, errors of law occurring at the trial could not be saved by the bill.

SAME.—*Instructions.*—Where instructions are not signed by the judge or the party asking them, or his attorney, and the record does not show that they were filed, and they are not in a bill of exceptions, they are not properly a part of the record.

SAME.—*New Trial.—Surprise.—Newly Discovered Evidence.*—There must be proper affidavits to show surprise and newly discovered evidence as causes for a new trial, and these must be brought into the record by bill of exceptions, else the Supreme Court can not review the ruling of the court below on the motion.

From the Wells Circuit Court.

R. S. Robertson and — Harper, for appellant.

L. M. Ninde and T. E. Ellison, for appellees.

BLACK, C.—This was an action brought by the appellant against the appellees James B. White, George W. Stites, Almira Stites and Simeon Cox.

The complaint alleged, in substance, that appellant, on the 18th of September, 1878, recovered a judgment in the superior court of Allen county, in this State, against the appellee George W. Stites, for \$1,086.87, and costs amounting to \$15.06; that on

85	376
164	438
85	376
165	242

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the 20th of September, 1878, he caused an execution to be issued on said judgment to the sheriff of Allen county; that on the 11th of November, 1878, said sheriff returned said execution unsatisfied except as to \$75.70; that on the 29th of September, 1878, appellant caused a second execution to be issued on said judgment to the sheriff of Wells county, who, on the 11th of November, 1878, returned said execution unsatisfied except as to \$15.90; that said judgment remained unsatisfied except as to \$31.80; that said George W. Stites had no other property of any kind in his own name subject to execution; that at the time and previous to incurring the indebtedness for which said judgment was obtained, to wit, on the 16th of August, 1876, said George W. Stites was the owner in fee of certain real estate, described, in Wells county, in this State, being a tract of eighty acres; that on the — day of April, 1877, said George W. Stites and his wife, Almira, conveyed said real estate to one Simeon Cox; that on the 23d of April, 1877, said Cox conveyed said real estate to said Almira Stites; that said several conveyances were made without any consideration; that they were made with the purpose and intent on the part of the defendants to cheat, hinder, delay and defraud the creditors of said George W. Stites; that he had not at the time sufficient other property to pay his indebtedness, and had not at the commencement of this suit sufficient other property to pay his indebtedness; that on the 6th of March, 1878, the appellees Almira Stites and her husband, said George W. Stites, conveyed said real estate to the appellee James B. White; that, prior to said conveyance to said White, appellant notified said White of the fraudulent nature of said previous conveyances, and that they were made without any consideration and with the purpose and intent to cheat, hinder and defraud the creditors of said George W. Stites; that said White, well knowing that said conveyances were so made, and with full notice thereof, took said conveyance of said property to himself, and claimed to be the owner thereof. And the plaintiff prayed judgment

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that said several conveyances might be set aside, declared null and void, and that plaintiff's judgment might be declared a first lien on said real estate, and for other proper relief.

The appellee White answered in a number of paragraphs and filed a cross complaint. The first paragraph of his answer was a general denial. The appellee Almira Stites filed a separate answer numbered as the fifth paragraph.

Appellant demurred to each of the paragraphs of White's answer except the first, and to the separate answer of appellee Almira, and demurred to said cross complaint for want of sufficient facts. All these demurrers were overruled, and appellant replied to the affirmative paragraphs of answer by denial, and answered the cross complaint also by denial. The appellees George W. Stites and Simeon Cox each answered by general denial. The cause was tried by a jury, who returned a general verdict for the defendants, with answers to interrogatories. A motion for a new trial made by the appellant was overruled, and judgment was rendered on the verdict.

The assignments of error which have been discussed by counsel relate to the overruling of the demurrers to the fourth and sixth paragraphs of appellee White's answer, the overruling of the demurrer to the separate answer of appellee Almira Stites, and the overruling of the motion for a new trial.

By his fourth paragraph of answer appellee White alleged that, after the said land in controversy was so conveyed to said Almira, the plaintiff, with full knowledge that said premises had been so conveyed, demanded and required of the said Almira, for the reason that she so held the title to said land, to wit, on the 17th day of May, 1877, to sign said notes, which she did; that said notes did not come due until the 16th day of August, 1878, and long after this defendant got his said deed; that said plaintiff demanded and required said Almira to sign said notes because and on account of her receipt of said conveyances for said land; and he then and there accepted her promise to pay said debt, because she was so the owner of said land. Wherefore the defendant says the plaintiff is

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estopped from averring or proving that said conveyance to said Almira was or is fraudulent and void.

By his sixth paragraph the appellee White alleged, in substance, that, on the 1st of March, 1861, said George W. Stites, who was then and still remained the husband of the appellee Almira, purchased of one Davidson certain real estate, described, in said Wells county, other than the land mentioned in the complaint, for \$750, took a title-bond therefor, and was unable to pay the balance of said purchase-money (the amount of the balance not being stated); that John Caston, father of said Almira, was then a man of wealth, and desired to advance to her a portion of his estate, to enable her to pay the remainder of said purchase-money, and then and there advanced to her money enough to pay said balance, and, at the request of said Almira, he paid said purchase-money to said Davidson, and took a deed from him to said George for said land, and held it for the benefit of said Almira until said George returned home from the war, where he had been during the time said payments were made; that upon his said return said Caston delivered said deed to him, upon the understanding and agreement then and there made between said George and Almira and her father, that George should take said deed and hold said land in trust for said Almira; upon which agreement George accepted the deed and always held said land in trust for Almira; until the 1st of April, 1866, when said Almira and George sold said land for \$1,000, and purchased therewith the land described in the complaint; that, by an understanding and agreement between said Almira and George, the deed for said premises so purchased was taken in the name of said George, upon his agreement to hold said land in trust for Almira, which he did until it was conveyed by him to said Cox, and by him to Almira; that, after the purchase of said eighty-acre tract, Almira received from her father and from his estate, the further sum of \$757, which, upon the faith of George's said agreement to hold said premises in trust for her, she invested in improvements on said land; that said agreements

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were made and said deeds were taken and held as aforesaid, in the name of said George, in trust for her, without any fraudulent intent whatever to defraud any one. Wherefore, it is said, Almira had a right to take said conveyance and hold the title, and that the same was not fraudulent.

The fifth paragraph, or separate answer of appellee Almira, alleged that her husband purchased said land of Davidson for \$750, and paid thereon \$75, and took a title-bond and was unable to make further payments. The remainder of her answer is in substantially the same terms as the sixth paragraph of White's answer.

In the fourth paragraph there is an evident want of attention to the complaint. No notes are mentioned in the complaint. But, assuming that the notes which Almira is alleged to have signed represented the indebtedness of her husband on which the judgment mentioned in the complaint was rendered, did that paragraph show a confirmation of the fraudulent conveyance? The appellee White does not in this paragraph deny the allegations of fraud in the complaint. He does not allege any knowledge on his part of the signing of the notes by Almira, or that he or any other person was in any way influenced in conduct by the facts alleged, or that any change of condition was induced thereby or dependent thereon. While it is alleged that the appellant had full knowledge "that said premises had been so conveyed," it is not alleged that he had knowledge that the conveyance was fraudulent, which was necessary to a confirmation. It is said that he demanded and required her signature because she held the title and on account of her receipt of the conveyance, and accepted her promise to pay the debt, because she was so the owner. It appears from the answer that the notes which she signed were not due, and that they did not mature for more than a year thereafter. The appellant could not have brought an action upon his claim, and therefore could not have sued to set aside the conveyances for fraud until after the conveyances had been made to appellee White. He seems to have

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proceeded promptly after his claim fell due. This answer alleges that the notes matured August 16th, 1878. The complaint alleged that he obtained his judgment on the 18th of September, 1878, and he commenced this action on the 12th of November, 1878.

It is not alleged in the answer that Almira was a married woman when she signed the notes, but this fact does appear from the complaint. Therefore, her signature could not constitute a consideration for an agreement on the part of appellant to confirm the conveyance in question, if such an agreement had been alleged. We think that this paragraph did not set forth a defence.

The sixth paragraph of appellee White's answer and the separate answer of appellee Almira allege the purchase by said Almira and her husband of the land in controversy with the proceeds of the sale of other land, which he had purchased, but for which she had furnished the greater part of the purchase-money; that George, after the conveyance to him of the land first purchased and the payment of the purchase-money, had agreed to hold it in trust for her and had so held it, and that when the other land was purchased the deed was taken in George's name upon his agreement to hold it in trust for her, and that he so held it until the legal title was conveyed to her; that while he so held it she improved it at her own expense, and that these agreements were so made and these deeds so taken and held by said George in trust, without fraudulent intent.

Taking these answers in connection with the complaint, the land mentioned in the complaint was purchased and the agreement to hold it in trust was made about ten years before the indebtedness to the appellant was contracted.

By section 6 of the act concerning trusts and powers (1 R. S. 1876, p. 915), it is provided that "When a conveyance, for a valuable consideration, is made to one person, and the consideration therefor paid by another, no use or trust shall re-

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sult in favor of the latter ; but the title shall vest in the former, subject to the provisions of the next two sections."

Section 8 provides that the provision of said section 6 shall not extend to cases "where it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest was to hold the land or some interest therein in trust for the party paying the purchase-money or some part thereof."

It is contended by appellant that the paragraphs under discussion did not show a trust in favor of Almira as against the creditors of her husband, and that they were therefore bad on demurrer: *First.* Because a portion of the purchase-money was paid by her husband, who bought in his own name. *Second.* Because the portion of the purchase-money paid by Almira was not shown to have been in payment of some specific part or distinct interest in the land. *Third.* Because the agreement to hold in trust was not made at the time of the purchase and conveyance, but was made after the land was bought and paid for, and after a deed of conveyance to the husband had been executed.

If this were a suit to enforce against the alleged trustee a trust in the land first purchased, or if that land had been conveyed by the husband to the wife, and this were a suit by creditors of the husband attacking such conveyance for fraud, we would feel called upon to discuss and decide the questions so suggested by appellant. The wife had paid the greater part of the purchase-money for that land, and when the husband was informed of this fact, and the deed came into his actual possession, he agreed to hold the land in trust for her, and while holding it with this understanding and agreement between them, they sold the land for a certain sum, and with this sum the land in controversy was bought, the husband and wife agreeing that it should be her land, but that he should hold the legal title. Whether or not in contemplation of law he was her trustee of the land first purchased, it was competent for him, in view of the fact that she had paid the greater

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part of the purchase-money, to treat the entire proceeds of the sale as hers, and upon the purchase of the other land to become her trustee for the whole of it, he acting in good faith with her, and both acting without fraud as to any person ; and such, we think, is the effect of each of these paragraphs.

There was, therefore, no error in overruling the demurrers thereto.

The motion for a new trial, made at the term at which the trial was had, was overruled at the next term.

Leave to file a bill of exceptions was then given, and the bill was filed within the time so given. Under the statute then in force, as construed in many cases by this court, this bill could not save exceptions taken on the trial. No notice, therefore, can be taken of the causes in the motion for a new trial relating to the admission or exclusion of evidence.

The transcript contains, as part of the record, what are said to be instructions to the jury, some given by the court, others asked by the parties. Those given by the court are not signed by the judge ; those asked by the appellant are not signed by him or his attorney, and it is not shown by the record that any of the instructions were filed ; therefore, no question is here upon any of the instructions. *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110.

One cause assigned for a new trial was newly-discovered evidence ; and another cause was, that appellant was surprised by certain testimony. It was necessary that each of these causes should be sustained by affidavit showing its truth. Section 355, Code of 1852. The latter cause is not supported by affidavit, and the affidavits in connection with the former cause are not brought into the record by bill of exceptions. No notice, therefore, can be taken of either of these causes.

The only other causes assigned in the motion and discussed by counsel were, that the verdict was not sustained by sufficient evidence, and that the verdict was contrary to law.

We could not sustain these objections to the verdict, except as to the appellee George W. Stites, without weighing con-

flicting testimony, and this we can not do. It is quite certain that under the evidence there should have been a verdict against the appellee George W. Stites. We can not say that the verdict and judgment are based exclusively on other issues than that formed on the fourth paragraph of the answer of appellee White, and, therefore, can not say that the overruling of the demurrer to that paragraph was a harmless error.

The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed, at the costs of the appellees, and the cause is remanded, with instructions to sustain appellant's demurrer to the fourth paragraph of appellee White's answer, and for further proceedings.

No. 9143.

McNAUGHTON ET AL. v. CITY OF ELKHART.

TOWN.—*Nuisance.—Pleading.*—Complaint by an incorporated town to recover the amount of a judgment which it had been compelled to pay, alleging an unlawful excavation, wrongfully and without permission made by the defendants in a sidewalk, into which one H. fell and was injured; that H. sued the town and recovered the judgment; that the defendants were notified of the suit and defended it. Answer that the excavation was made for a stairway to the basement of a building of one of the defendants, such as was customarily made by others, with the knowledge of the town; that due care was used to avoid injury; that an unexpected caving of the earth occurred, of which the plaintiff had notice, but failed to inform the defendants, and the injury was the result of such caving, and could have been avoided by a trifling expense.

Held, that the answer was insufficient, because it did not aver permission from the town to make the excavation, but only evidence tending to show permission.

SAME.—*Streets.—Negligence.*—An excavation in a sidewalk of an incorporated town, made without leave, is a nuisance *per se*, and the wrong-doer is liable to the town for such damages as it incurs to persons injured thereby; and this liability does not depend upon the negligence or care with which the excavation was made or guarded.

85	384
160	602
85	384
161	99

85	384
170	379

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SAME.—Judgment.—Res Adjudicata.—In such case, where the town, upon being sued, notified the wrong-doer thereof, and that it will look to him for indemnity, the judgment concludes him, as to the facts thereby adjudicated.

SAME.—Principal and Agent.—Where an act done is unlawful, creating a nuisance *per se*, an agent who actively participated therein, is liable alike with his principal.

PLEADING.—Averment.—The allegation in a pleading of circumstances from which a fact may be inferred is not equivalent to an averment of the fact.

From the Elkhart Circuit Court.

J. H. Baker and *J. A. S. Mitchell*, for appellants.

J. M. Vanfleet, for appellee.

ZOLLARS, J.—This action was commenced by the appellee against the appellants, to recover the amount of a judgment which it had been compelled to pay to one Lydia Ritter, which judgment she recovered against the corporation for injuries received from a fall into an excavated sidewalk.

The substance of the complaint is that in 1875 the appellants, without permission from the town of Elkhart, unlawfully and wrongfully made an excavation in the sidewalk along the north side of lot No. 16, of the original plat of said town, situated on one of the principal streets, and left said excavation in an unsafe and unguarded condition; that while the sidewalk was in such unsafe and unguarded condition, Lydia Ritter, without fault on her part, fell into the excavation and was injured. It is further alleged that said Lydia Ritter brought a suit against the town, for damages, on account of said injury, and recovered a judgment; that, after the action was begun, the town notified appellants that they would be held liable for whatever judgment the town might be compelled to pay, and that they appeared, made defence, and caused an appeal to be taken to the Supreme Court, where the judgment was affirmed; that in January, 1880, the appellee paid the judgment and costs, amounting to \$1,000, for which amount judgment is asked against appellants. There

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is a second paragraph of complaint, but for the purposes of this decision it need not be set out.

To this complaint appellants filed their joint and separate answers. The record states that they were in three paragraphs, but we find in the record the second and third only. Appellee filed its demurrer to each paragraph of the answer, which was sustained by the court, and appellants excepted and now assign the ruling as error. They declined to answer further, and judgment was rendered against them. The third and joint answer states substantially that appellant Defrees was the owner, and in possession by tenants, of the lot mentioned in the complaint; that there was a brick building upon it, with a basement suitable for occupancy; that appellant McNaughton was her agent, and had in charge the renting and repairing of said building; that under her direction, and with the knowledge and without objection from the town, he took up the sidewalk, made the excavation and constructed a stairway for the purpose of gaining access to the basement of the building and admitting air and light thereto; said stairway being such as other property owners on the street were accustomed to have and use with the consent of the town. It is further stated that, while the work was in progress, appellants, as the town knew, exercised great care in keeping the excavation guarded and in a safe condition; that the excavation was carefully guarded and protected by "planting" wooden posts on the outside thereof, at a suitable distance therefrom, and by securely nailing boards to said posts on all sides of the excavation, and by covering it securely with boards, so as to prevent persons from falling into or in any way being injured thereby. It is further averred that on the day said Lydia Ritter was injured, the work was temporarily suspended, and appellants absent, McNaughton at his home in Elkhart, and Mrs. Defrees at her home ten miles distant, and that the excavation was left, on the morning of said day, securely guarded, as above stated, and in all respects safe and secure; that during said day a

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portion of the earth at the side of the excavation, about two feet in width and three feet in length, outside of the said guards, suddenly caved in, being caused by the sudden and unexpected thawing of the earth and the action of the elements, the weather having suddenly turned warm. It is further stated that neither of appellants had any notice that the excavation had thus become dangerous, but believed it to be safe and securely guarded as left by them; that if they or either of them had known of the danger, they could and would have prevented the injury.

There is a further allegation that appellee was at once notified of the dangerous condition of the excavation by reason of the caving in aforesaid, and could have guarded the same so as to have prevented the injury, at a nominal expenditure of time and money; that appellee, through its officers, could have notified appellant McNaughton within five minutes, but carelessly neglected to do so, or to take any steps to prevent the injury.

In deciding upon the sufficiency of this answer, it is material to determine whether or not the pleadings show the excavation to have been made and the stairs erected with the permission of the town. If with such permission, and they did not constitute a nuisance *per se*, the appellants were not wrong-doers, but engaged in a lawful work, and could become liable only upon their neglect to properly guard and protect the excavation, so as to prevent injury. The ground of liability in such case is negligence, and an answer setting up absence of negligence and the exercise of proper care would be a good answer. Cooley Torts, p. 626; Wharton Negligence, sec. 816 and cases cited; *City of Fort Wayne v. De Witt*, 47 Ind. 391; *Fisher v. Thirkell*, 21 Mich. 1 (15 Am. R. 460).

If, on the contrary, the pleadings show that the excavation was made and the stairs erected without such permission, appellants were wrong-doers; the authors of a nuisance in the street, are without reference to care or negligence, liable for all injury resulting therefrom. The doctrine is well stated by

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Judge Cooley, in his work on torts, as follows: "If an individual, whether the adjoining owner or not, and whether the fee in the public way is in himself or in the public, does any act which renders the use of the street hazardous or less secure than it was left by the proper public authorities—as by excavations made in the sidewalks, or by unsafe hatchways left therein, or by opening or leaving open area ways in the travelled way, or by undermining the street or sidewalk—he commits a nuisance, and he is liable to any person who, while exercising due care, is injured in consequence. If, however, he has the consent of the proper public authorities, and what he does is consistent with the customary use of the way for private purposes—as where he is making connection with a public sewer or with a gas main—and he observes a degree of care proportioned to the danger, and is consequently chargeable with no fault, he can not be held responsible for accidental injuries, inasmuch as in such case he has failed in the observance of no duty. The question in all such cases is one of due and proper care." Cooley Torts, 626. See, also, *Town of Centerville v. Woods*, 57 Ind. 192; *Pettis v. Johnson*, 56 Ind. 139.

Does the answer negative the charge of wrong made in the complaint, and show permission from the town to make the excavation?

The complaint charges in direct terms, that appellants, without permission from the town, unlawfully made the excavation. Giving the fullest possible scope to the averments of the answer, they do not constitute a denial of the allegations of the complaint in this particular. It is stated that appellants, with the knowledge of and without objection from the town, made the excavation. The purpose of this averment, doubtless, was to show an implied permission on the part of the town. This, as a matter of evidence, would have been competent to go to the court or jury as tending to show such permission, but, as a matter of law, does not establish such fact. It is not stated how long appellants were engaged upon the excavation. For

aught that appears in the answer, it may have been but for a day, or half day.

We can not enlarge the answer by any kind of presumption ; indeed, the general rule is to construe a pleading strictly against the pleader.

It can not be said with any kind of reason, that towns and cities must at once, upon knowledge of the fact, stop a wrongful excavation in the sidewalks, or be held to have consented thereto. It is further stated in the answer, that appellants made the excavation and constructed a stairway for the purpose of gaining access to the basement of a building, and to admit air and light thereto ; said stairway being such as other property owners on the street were accustomed to have and enjoy with the consent of the town. That fact, too, under a proper answer, might have gone to the court or jury as evidence tending to show permission from the town, but it does not negative the allegations of the complaint, or amount to an averment that appellants had such permission. Here, again, it is not stated for how long a time others had been allowed to use such stairways with such consent. It may have been but for a very short time. These are the only averments of the answer upon the question of permission from the town, and they do not show such permission, or meet the allegations of the complaint, that the excavation was made without such permission, and unlawfully. We must, therefore, hold that, as shown by the pleadings, appellants, in making the excavation, were acting without such consent, were wrong-doers, and as such responsible for all injuries resulting from such excavation to others without fault.

It follows, therefore, that the liability of appellants is not to be measured by their care or negligence in making or guarding the excavation, and that the answer attempting to set up due care and diligence as a defence is not a sufficient answer to the complaint.

The second answer is the separate answer of appellant McNaughton. Upon the question of permission from the town,

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the averments are the same as in the joint answer. It is stated further that his co-defendant, Mrs. Defrees, was the owner of the lot; that he was her agent, and as such, at her direction, employed competent workmen to make the excavation; "that except as such agent, and with the exception of employing the workmen and carrying out the directions of his principal in directing said workmen, he had and has no interest in or possession of said lot, and was not otherwise in any manner concerned in making the excavation." It is strenuously contended by the able counsel for appellant, that McNaughton, as shown by this answer, if in fault at all, was guilty of a non-feasance only, and therefore not liable. We can not agree with counsel. McNaughton's fault was not the omission of a duty simply. So far as he was connected with the making of the excavation, it was in an active capacity. He was employing men to make the excavation, and directing them in making it. He was guilty of a misfeasance, the excavation being wrongful and unlawful. Hilliard lays down the rule of liability as follows: "Thus it is held, that, where an immediate act is done by the co-operation or the joint act of two or more persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all, even to the extent of exemplary damages; provided, however, either that they acted in concert, or that the act of the party sought to be charged ordinarily and naturally produced the acts of the others. So 'all persons, who direct or request another to commit a trespass, are liable as co-trespassers.' All who aid, command, advise, or countenance the commission of a tort by another, or who approve of it after it is done, without reference to comparative, individual interest, are liable, if done for their benefit, in the same manner as if they had done the tort with their own hands. Thus, a person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same, is in law deemed to be an aider and abet-

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tor, and liable as principal." 2 Hilliard Torts, 242 and 243. We agree with counsel that there are cases where the agent, employed about his principal's business and acting under his directions, is not liable to third parties for mere omissions; but this is not such a case. In no case, where the thing done is unlawful, can the agent shelter himself behind his principal and escape liability. *Wright v. Compton*, 53 Ind. 337; Story Agency, sections 311, 321; Wharton Agency, section 542; *Harriman v. Stowe*, 57 Mo. 93.

Are appellants bound by the judgment against the corporation?

The complaint, as we have seen, states that, without permission, the sidewalk was excavated and left open; that one Lydia Ritter, without fault, fell into it and was injured; that she brought her action against the corporation for damages on account of such injury; that appellants, upon notice, appeared and made defence; and that a judgment was recovered against the corporation, which it paid.

It is well settled that when a town or city has been compelled to pay damages on account of excavations and obstructions in its streets, wrongfully made, or lawfully made and negligently left in a dangerous condition, it has a right of action over against the author or authors of the nuisance for the amount so paid; and that, if properly notified of the action, such person or persons are bound and concluded by the judgment recovered against the corporation, as to all questions adjudicated in such action.

In this case it sufficiently appears that, in the suit against the corporation, it was settled and adjudged that the excavation was made and left in an unsafe and unguarded condition; that Lydia Ritter, without fault on her part, fell into the excavation, was injured, and suffered damage to the amount of the judgment. It is alleged, and admitted because not denied, that appellants were notified of the action and appeared and made defence. They are now barred from contesting any of the facts so adjudicated. They were not, by

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the judgment, precluded from pleading and proving that they did not make the excavation; but this the answers admit. And had they properly alleged in the answers that they made the excavation with the permission of the town, they might also have alleged and proved, as a defence to this action, that they were not guilty of negligence in guarding and protecting the excavation. *City of Boston v. Worthington*, 10 Gray, 496; *Catterlin v. City of Frankfort*, 79 Ind. 547 (41 Am. R. 627); *Chicago City v. Robbins*, 2 Black, 418; *Robbins v. Chicago City*, 4 Wal. 657.

The court below correctly sustained the demurrer to the answers.

The judgment is affirmed, at the costs of appellants.

WOODS, C. J., did not participate in the decision of this case.

 No. 9717.

TAGGART v. MCKINSEY.

SHERIFF'S SALE.—*Time of Redemption.*—*Sheriff's Deed.*—*Estoppel.*—It is competent for the purchaser of real estate at sheriff's sale, to suffer the land to be redeemed from such sale, after the expiration of the year allowed by law for such redemption and before the execution of the sheriff's deed, and if he agree to such redemption, and accept the redemption money, he will be estopped to deny the right to redeem.

SAME.—*Effect of Redemption.*—The effect of a redemption is to vacate and set aside the sheriff's sale of the real estate, and to restore the same and the title thereto precisely as they were held prior to the sale.

SUPREME COURT.—*Weight of Evidence.*—Where the evidence in the record fairly tends to sustain the verdict on every material point, the Supreme Court will not disturb the verdict on the weight of the evidence.

From the Brown Circuit Court.

W. W. Browning, — *Cummings*, *R. Hill* and *J. W. Nichol*, for appellant.

G. W. Cooper, for appellee.

85	392
130	393
130	395
85	392
130	170
85	392
140	613
85	392
147	22
85	392
158	390

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Howk, J.—This was a suit by the appellant to recover the possession of certain described real estate, in Brown county, and damages for its detention. The appellee answered by a general denial of the complaint, and by a cross complaint. The appellant's demurrer to the cross complaint, for the want of sufficient facts, was overruled by the court, and his exception saved to such ruling. The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, that he was the owner and entitled to the possession of the real estate in controversy, and that his title thereto should be forever quieted and put to rest, as against the appellant's claim. Over the appellant's motion for a new trial, and his exception saved, the court rendered judgment for appellee, in accordance with the verdict.

The appellant has assigned, as errors, the decisions of the court in overruling his demurrer to appellee's cross complaint, and his motion for a new trial.

1. In his cross complaint, the appellee alleged, in substance, that on April 22d, 1876, he purchased the real estate described in appellant's complaint, of one Thomas J. Taggart, and that the said Thomas J. and Evaline Taggart, his wife, on the same day, by their warranty deed, conveyed the same real estate to the appellee; that, before such purchase and conveyance, one Adam T. Smith recovered two judgments, in the Brown Circuit Court, against the said Thomas J. Taggart and the appellant, to wit, one for the sum of \$228.15, on June 21st, 1875, and the other for \$132.30, on November 1st, 1875; that on August 15th, 1876, executions were issued on both of said judgments, directed and delivered to the sheriff of Brown county, who thereafter, on November 27th, 1876, levied the same on the real estate in controversy, and on other lands at that time belonging to said Thomas J. Taggart; that afterwards, on January 6th, 1877, the said sheriff, by virtue of said executions, offered and sold at public sale all the real estate and lands so levied on, as an entirety, to the appellant, for the sum of \$250; and that the sheriff then

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and there executed to the appellant a certificate of such sale; that after the sheriff's sale of said real estate and other lands, and before the sheriff executed a deed thereof to the appellant, the said Thomas J. Taggart and one James Hamblen fully paid to the appellant the sum of \$280, in full of his purchase-money, interest and costs, and that the appellant accepted such payment in full satisfaction of all his claim in and to the real estate in his complaint described, but failed to surrender his certificate of purchase to the appellee, or to said Thomas J. Taggart and James Hamblen; that after such payment of \$280, and the acceptance thereof by the appellant as a full, final and complete settlement of all matters in relation to the real estate described in his complaint, he procured a sheriff's deed of such real estate, and was claiming title thereunder, which was a cloud upon appellee's title. Wherefore, etc.

It will be observed that it is not alleged in this cross complaint that the sum of \$280 was paid to and accepted by the appellant, in satisfaction of his claim to the real estate in controversy, before the expiration of the year allowed by law for the redemption thereof from the sheriff's sale. It may be assumed, therefore, as against the appellee, that the payment was made and accepted after the year for redemption had expired, but, as alleged, before the sheriff had executed a deed of the real estate to the appellant. It is competent for the purchaser of real estate at sheriff's sale to suffer the redemption thereof after the expiration of the year allowed by law for such redemption; and if he agree to such redemption, and accept the redemption money, he will be estopped to deny the right to redeem. *Goddard v. Renner*, 57 Ind. 532. Until the execution of the sheriff's deed, the title or interest of the purchaser is defeasible during the time allowed by law for redemption from the sheriff's sale; and after the expiration of that time the payment of the redemption money and its acceptance by the purchaser, and before the execution of such deed, will defeat his title or interest under his certificate of sale, and annul such certificate. The effect of such redemption

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is to vacate and set aside the sheriff's sale of the real estate, and to restore the same and the title thereto precisely as they were held prior to such sale. *Teal v. Hinchman*, 69 Ind. 379; *Smith v. Moore*, 73 Ind. 388; *Duke v. Beeson*, 79 Ind. 24.

The allegations of the cross complaint are not so full, clear and explicit as they might have been, but they can only be construed to charge, that before the execution of the sheriff's deed under which the appellant claims title, but after one year had expired from the date of the sheriff's sale, the full amount of the redemption money was paid to and accepted by the appellant, in full satisfaction of all his claim in and to the real estate described in his complaint. The appellant had the right to accept such redemption money, if he chose so to do, after the expiration of one year from the date of the sheriff's sale; and if he did so, as alleged, the redemption would be as full and complete, and have the same consequences, if the sheriff's deed had not been executed, as if the redemption had been made within the year allowed by law therefor. The certificate of sale would be thereby annulled, and the sheriff's deed, subsequently executed on such certificate, would be void and of no effect. Possibly, the cross complaint would have been open to a motion to make its allegations more certain and specific; but it is certain, we think, that the facts therein stated were sufficient to constitute a cause of action, in appellee's favor, and to withstand the appellant's demurrer thereto.

In discussing the questions arising under the alleged error of the court, in overruling the appellant's motion for a new trial, his counsel have devoted the most of their argument to the insufficiency of the evidence, as they assert, to sustain the verdict. They have placed much stress, in their brief, upon an admission of the appellee in regard to the validity of the sheriff's deed, under which the appellant claimed his title to the premises in controversy. This admission was made and used for the purpose of evidence on the trial of the cause. Since the filing of the appellant's brief, however, the appellee has procured, by a proceeding in the trial court to that end,

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and has brought before this court, such a material modification or alteration of his alleged admission, as entirely destroys the force of appellant's argument on that point. The evidence abundantly tends to sustain the verdict of the jury on every material point; and in such case, as we have often decided, we can not disturb the verdict on what we might regard as the weight of the evidence. *Rudolph v. Lane*, 57 Ind. 115; *Swales v. Southard*, 64 Ind. 557; *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73.

It was assigned as cause for a new trial, in the appellant's motion therefor, "That the court erred in giving to the jury, of its own motion, instructions from one to —, inclusive." We do not think that this cause for a new trial called in question in the trial court, or presents any question here of error in, any of the instructions except instruction one. The court gave, of its own motion, seventeen written instructions, but the appellant designates only instruction one as erroneous in his motion for a new trial. Of this instruction the appellant's counsel say: "The first instruction is a mere recital of the nature of the controversy, and no point is made on it." The only instruction, of which complaint is made in argument, is the fourth one; and of this one, if it were properly before us, it might well be said that the objection pointed out to it presents no available error. Counsel do not complain of what the instruction states, but of what it omits to state. The proper remedy for such an omission is, not an exception to the instruction given, but a request to the court to give an instruction supplying or covering the omission. Then, if the court refuse to give the instruction asked for, and the proper exception is saved, the error, if it be an error, will be presented by the record. But, in such case, the party can not, by merely saving an exception to the instruction given, get an available error into the record. *Jones v. Hathaway*, 77 Ind. 14.

The court did not err, we think, in overruling the motion for a new trial.

The judgment is affirmed, with costs.

 Brock v. The State, *ex rel.* Johnson.

No. 9805.

BROCK v. THE STATE, EX REL. JOHNSON.

85	397
147	589
85	397
166	199

BILL OF EXCEPTIONS.—*Evidence.*—No precise form of words is required to show that a bill of exceptions contains all the evidence.

BASTARDY.—*Marriage of Parents.*—The marriage of the parents of an illegitimate child, and the father's acknowledgment of its parentage, have the effect by statute, R. S. 1881, sections 2475, 2476, to make the child legitimate; and a prosecution for bastardy can not be afterwards instituted and maintained, though the marriage was entered into by the father in bad faith, merely to escape a pending prosecution for bastardy, and then to abandon the mother.

From the Floyd Circuit Court.

J. V. Kelso, for appellant.

E. G. Henry, for appellee.

ELLIOTT, J.—The appellee insists that the bill of exceptions does not show that it contains all the evidence, and that consequently no questions are presented by this appeal. The bill does not, it is true, contain the usual formula, but it does contain a statement clearly and unequivocally showing that all the evidence is incorporated. Where the bill of exceptions fully shows that all the evidence given upon the trial is set forth, the precise form of words used in showing that fact is not of controlling importance.

On the 24th of September, 1877, the relatrix, Fanny Johnson, then Fanny Dunn, instituted proceedings against appellant, under the statute regulating proceedings in cases of bastardy; the justice before whom they were instituted made the proper order transferring the case to the circuit court; before trial in that court the relatrix and the appellant were married and the prosecution against the latter was dismissed. There is evidence tending to show that the appellant married the relatrix for the purpose of escaping from the prosecution against him, and that at the time he married her he intended to abandon her and the child. Some time after the marriage she applied for and obtained a decree of divorce.

Brock v. The State, *ex rel.* Johnson.

The question for decision is, whether the relatrix can maintain proceedings under the statute to compel appellant to furnish means of support for the child born out of wedlock. If the marriage legitimized the child, then it is quite clear that the prosecution can not be maintained. If the child was once made legitimate, no subsequent act could take from it this character, and give it that of illegitimacy. The case, therefore, turns upon the answer to the question, did the marriage subsequent to the birth of the child legitimize it?

One among the old doctrines of the common law is the rule that children born during wedlock are legitimate, although begotten before marriage. Our cases, acting upon this rule, have declared that marriage bars a prosecution for bastardy in such cases. *Moran v. State, ex rel.*, 73 Ind. 208; *Doyle v. State, ex rel.*, 61 Ind. 324. But the rule is not decisive of this case, for the child of these parties was born before marriage.

The civil law declares that marriage legitimizes children born before marriage. The common law is different; a subsequent marriage does not legitimize such children. The bishops of England pressed upon the House of Lords the adoption of the rule of the civil law, but, as the old record runs: "And all the Earls and Barons with one voice answered that they would not change the law of the realm, which hitherto had been used and approved." The old chronicler, in speaking of this decision, says: "And the which noble, courageous and heroic answer, all the lawyers do mightily approve." As the common law prevails in our State, we must follow it unless we find it in conflict with some statute of our own.

Our statute adopts the rule of the Roman law, sections 2475 and 2476, R. S. 1881. Mr. Schouler says: "This doctrine of the civil law has found great favor in the United States. It has prevailed for many years in the States of Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri, Indiana, and Ohio." Schouler Domestic Rel. 309.

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It is clear that the acknowledgment by the father made the child his heir apparent, and removed from it the stain of illegitimacy. It is not important whether the acknowledgment of legitimacy was made for a good or for an evil purpose; it fixed the *status* of the child, and that can not be changed by anything the father or mother may do. Having removed the "bar sinister," they can not replace it.

The question here is, not whether the relatrix may have some cause of action against the appellant, but whether she can maintain a prosecution under the statute for the maintenance of a bastard child. As the child can not be considered a bastard, it is very clear that the prosecution must fail.

Judgment reversed.

128	116
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No. 9528.

WILSON v. ENSWORTH.

SEDUCTION.—*Promise.—Contract.—Consideration.*—A complaint by a woman for her own seduction, which shows by its averments that she was induced to yield her person to the defendant by the promise of a pecuniary consideration, which he has refused to perform, is bad on demurrer.

SAME.—*Public Policy.*—Such a contract, being immoral and vicious, is against public policy and void.

PRACTICE.—*Statute of Limitations.—Demurrer.*—The statute of limitations is not available on demurrer to a complaint unless it affirmatively appears that the case is not within any of the exceptions to the statute.

From the White Circuit Court.

J. R. Coffroth, T. A. Stewart, A. W. Reynolds, E. B. Sellers and *J. T. Sanderson*, for appellant.

J. H. Ash and *D. Turpie*, for appellee.

MORRIS, C.—The appellee sued the appellant in the Newton Circuit Court, for her own seduction. The suit was removed by change of venue to the Benton Circuit Court, and from the latter to the White Circuit Court. The complaint contains two paragraphs.

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The first states that the appellee is over twenty-one years of age ; and that she is, and has been for ten years, a resident of Goodland, Newton county, Indiana, and that until the committing of the wrongs by the appellant, hereinafter stated, she had been a person of good name and reputation, and deservedly enjoyed the esteem and good opinion of the community in which she lived, and was esteemed to be a person of good character for chastity ; that the appellant, well knowing her good character and reputation, "wickedly, wrongfully, deceitfully, and purposely intending to injure the plaintiff, and to bring her into public scandal and disgrace, heretofore, to wit, on or about the 15th day of January, 1878, and within two years before the filing of her original complaint herein (she then being an unmarried woman), did wickedly, wrongfully, deceitfully, injuriously and purposely seduce, debauch, and carnally know the plaintiff, under the promise that he would pay off and fully discharge a certain mortgage indebtedness, and other legal liens, then existing against and upon certain real estate in said county of Newton, then belonging to and the property of said plaintiff, which were held by Josiah Stracon and James H. Taylor and others, and save her said property ; that he would supply the plaintiff with money and means to carry on her trade and business as a milliner and dressmaker, in which business she was then engaged in said town of Goodland ; and that he would also support the plaintiff with food, clothing, and the comforts and necessities of life, if the plaintiff would submit her person to the lascivious and illicit desires of the defendant. She says these several promises and inducements were held out to the plaintiff by the defendant at divers times and on divers occasions, within two years immediately preceding the filing of her original complaint ; but that the defendant did not furnish the money to pay off the aforesaid liens, nor did he perform either of his aforesaid promises, falsely made by him for the purpose and with the intent on his part of debauchery as aforesaid." It is averred, that, by means of the appellant's false

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promises, which the appellee relied upon and believed, and by his falsehood, wiles, deceit, conniving and libertinism, the appellee has been seduced, debauched, and ruined, and reduced to penury and want, to her damage \$10,000.

The second paragraph is like the first, except that it charges that the plaintiff was seduced on and at divers times after the 15th day of August, 1878; and that the promises of the appellant, which are the same as those alleged in the first paragraph, were made at the times she is alleged to have been seduced.

The appellant demurred separately to each paragraph of the complaint. The demurrer was overruled.

The appellant then answered the complaint in three paragraphs, the first being the general denial. Issue was taken on the second and third paragraphs of the answer by a general denial. The cause was tried by a jury, who returned a verdict for the appellee. The appellant moved for a new trial; the motion was overruled; he then moved in arrest of judgment; this motion was also overruled.

The errors assigned question the rulings of the court upon the demurrer to the complaint, and on the motions for a new trial and in arrest of judgment.

The appellant insists that the demurrer to the first paragraph of the complaint should have been sustained, for the reason that it appears upon the face of it that the cause of action therein stated is barred by the statute of limitations. In this we think the appellant is mistaken. Unless it appears upon the face of the complaint, that neither party is within any exception contained in the statute, the question insisted upon can not be raised by demurrer. *Dunn v. Tousey*, 80 Ind. 288; *McCallam v. Pleasants*, 67 Ind. 542. There is nothing in either paragraph of the complaint to show that the appellant may not have been a non-resident of the State during a portion of the two years immediately preceding the commencement of this suit. Besides, it is averred in each paragraph of the complaint, that the seduction occurred

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within two years before the filing of the original complaint. We think this objection not well taken.

It is also contended by the appellant that the alleged seduction was the result of a bargain, deliberately made between him and the appellee; that, in consideration that he would furnish her with pecuniary aid and support, she would consent to have criminal intercourse with him; that, such an arrangement being immoral and vicious and against public policy, the parties to it are, in the eye of the law, equally guilty, and neither can legally claim damages for its violation, or remuneration for consequences growing out of it.

On the other hand, the appellee insists that the real charge is that the appellant, by falsehood, deceit, wiles, conniving and wrong, seduced the appellee; that the statements and averments in the complaint in relation to the appellant's promised aid and support may be regarded as surplusage, and that, if stricken out, as they should be, there will be enough left in the complaint to constitute a good cause of action. It may be true that, if the statements in relation to the pecuniary aid promised by the appellant were stricken out, the complaint would be good. *Rees v. Cupp*, 59 Ind. 566. But the question is, would the remaining words, upon the above supposition, have the same meaning when separated from the words stricken out that they would have if taken in connection with them. The substantial charge is that the appellant wickedly, deceitfully, wrongfully and purposely seduced the appellee. But this is expressly alleged to have been done *under*, that is, by means of, a promise on the part of the appellant to pay off liens on the appellee's property, furnish her money to carry on her business, and to keep and support her, in consideration that she would submit her person to his desires. It is alleged that she relied upon and believed these promises, and that he failed to fulfil them; that they were falsely made with a view to her seduction. It is also alleged, by way of conclusion, that by his promises, falsehood, wiles and deceit, the appellant had ruined the appellee, etc.

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It is impossible, we think, to resist the conclusion, from the facts as stated in the complaint, that the real grievance on the part of the appellee was the failure of the appellant to pay off the liens on her real estate, furnish her money to carry on her business and keep and support her, as he had promised to do. The words "wickedly, deceitfully, wrongfully and purposely," as used in the complaint, relate to the promised aid and support, and the failure of the appellant to fulfil his promises. Standing alone, they are without significance; but, taken in connection with the aid and assistance promised by the appellant, they have a clear and unmistakable meaning. They mean that the promises were made by the appellant without any honest purpose to perform them, and with a view to secure criminal relations with the appellee. However dishonorable and disreputable this may have been on the part of the appellant, the appellee is without remedy; she bargained for her virtue, and, if she failed to secure the price agreed upon, it is her own fault and folly, and she can not be heard to complain. Had the appellant paid off the liens upon the appellee's real estate, amounting to over \$1,000, furnished her indefinite sums of money to carry on her business, and kept and supported her, as it is alleged he agreed to do, no one would think her entitled to additional compensation for the loss of her alleged chastity. She would have its agreed and accepted equivalent. If the appellee could not maintain this action had it been alleged in her complaint that, instead of failing, the appellant had performed all his promises, she can not maintain it upon the facts as stated. The contract is immoral and vicious, and against public policy.

As we construe the complaint, the appellee agreed to dispose of her virtue for a pecuniary consideration. Through this agreement, she lost that for which she now seeks compensation. The contract being immoral and illegal, the law will afford her no remedy for the consequences which may have grown out of and resulted from it. *Hogan v. Cregan*, 6 Robertson, 138; *Johnson v. Holliday*, 79 Ind. 151. It is possible

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that a woman of mature age, who has once been married, and is a mother, may be seduced by the husband of another woman; but for such a woman to listen to the pecuniary persuasions of such a man would seem to involve mere mercenary considerations, and indicate an absence of chastity. The woman must have become debauched in feeling and sentiment, and unchaste, before she could entertain such a proposition. As said by the Supreme Court of Michigan, in the case of *People v. Clark*, 33 Mich. 112: "Illicit intercourse alone would not constitute the offence charged. In addition to this the complainant, relying upon some sufficient promise or inducement, and without which she would not have yielded, must have been drawn aside from the path of virtue she was honestly pursuing at the time." The averments in this case are, and such was the testimony of the appellee, that the illicit intercourse between the parties commenced early in January, 1878, more than two years before the commencement of this suit, and continued until August, 1879. It is true that their illicit relations ceased from some time in July, 1878, until the 15th of the following August. But there is no evidence that any genuine reformation on the part of the appellee produced this intermission of their criminal intercourse. MARSTON, J., in the case just referred to, says:

"Nor will illicit intercourse which takes place in consequence of, and in reliance upon a promise made, make the act seduction. If this were so, then the common prostitute, who is willing to sell her person to any man, might afterwards make the act seduction by proving that she yielded relying upon the promise of compensation made her by the man, and without which she would not have submitted to his embraces. Illicit intercourse, in reliance upon a promise made, is not sufficient, therefore, to make the act seduction. The nature of the promise, and the previous character of the woman as to chastity, must be considered."

It was as criminal on the part of the appellee to agree to part with her virtue for a pecuniary consideration as it was

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on the part of the appellant to agree to pay it. Where the criminal intercourse results as much from the faults of the one as the other, there is no seduction. *Hill v. Wilson*, 8 Blackf. 123.

In this case the promise was pecuniary aid. Reliance upon such a promise did not make the act seduction. A promise to marry would be different, and constitute a sufficient inducement. The yielding of the woman to the solicitations of the man, under such a promise, would imply a promise on the part of the woman to marry the man. The contract would be legal, and for its breach the law would give the injured party a remedy. *Kenyon v. People*, 26 N. Y. 203; *Kurtz v. Frank*, 76 Ind. 594.

We think the judgment below should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellee.

No. 9882.

HINKLE v. HOLMES ET AL.

APPEAL BOND.—*Supersedeas*.—*Bond, Effect of*.—*Pleading*.—*Costs*.—*Measure of Damages*.—H. recovered a personal judgment against J. R. and D. R. for \$631.76, and costs, and a foreclosure of a chattel mortgage against them and J. H., with a decree for the sale of the property to make the debt and costs. J. H. appealed to the Supreme Court, and, having given a proper bond, obtained a supersedeas. The judgment and decree were affirmed after the lapse of two years, but meantime the value of the mortgaged property had deteriorated by use and abuse, from \$1,000 to little or nothing, so that on final sale by the sheriff upon the decree, it yielded only \$265, so that, deducting also some payments, there remained of the judgment unsatisfied the sum of \$302.05; J. R. and D. R. having been at all times insolvent. Suit on the appeal bond.

Held, that a complaint alleging these facts was good on demurrer.

Held, also, that the supersedeas having restrained all proceedings on the personal judgment, as well as the decree for sale, there was a liability on

Hinkle v. Holmes *et al.*

the bond for whatever injury was liable to result to the plaintiff from the appeal, and not merely for costs; but what would be the measure of damages upon a complaint so meager in its averments is not decided. *Held*, also, that an appeal bond need not be signed by all the judgment defendants. *Willson v. Glenn*, 77 Ind. 585, distinguished.

From the Jackson Circuit Court.

B. H. Burrell and *F. Emerson*, for appellant.

W. K. Marshall and *R. Applewhite*, for appellees.

NIBLACK, J.—The complaint in this case was by David F. Hinkle against John W. Holmes and Edward C. Emery, and stated that, on the 4th day of May, 1876, the plaintiff had, in a certain action in which he was plaintiff, and James Ramey, Daniel E. Ramey and the said John W. Holmes were defendants, recovered a judgment against the said James Ramey and Daniel E. Ramey, for the sum of \$631.76, and a foreclosure of a chattel mortgage against all of the defendants, to satisfy said judgment, and for costs in said action, taxed at \$229.93; that, on the 23d day of May, 1876, the plaintiff caused an execution and order of sale to be issued on said judgment and decree of foreclosure, directed to the sheriff of Jackson county, to satisfy the amount of principal, interest and costs due upon such judgment; that, on the 31st day of October, 1876, said sheriff advertised the mortgaged property for sale, to pay said judgment; that previously thereto, that is to say, on the 20th day of October, 1876, the defendant Holmes had appealed said cause to the Supreme Court by filing a transcript of the proceedings therein in the office of the clerk of said court; that afterwards, on the 8th day of November, 1876, an order was issued out of and by the direction of the Supreme Court, for the stay of all proceedings upon the judgment and decree appealed from in said cause; that said order for the stay of all proceedings was filed in the office of the clerk of the Jackson Circuit Court, on the 10th day of November, 1876; that on the 11th day of November, 1876, the said Holmes, with the defendant Emery, executed an appeal or supersedeas bond, substantially as follows:

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“Know all men by these presents, that we, John W. Holmes and Edward C. Emery, are held and firmly bound unto David F. Hinkle, in the sum of fifteen hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, this 11th day of November, 1876.

“The above obligation is, nevertheless, upon the following express condition, to wit: That whereas, the said David F. Hinkle recovered a judgment, amongst other things, against said John W. Holmes, for the foreclosure of a chattel mortgage to make the amount of \$—— and costs of suit, at the April term, 1876, of the Jackson Circuit Court, in a certain suit then therein pending, wherein the said David F. Hinkle was plaintiff and James Ramey, Daniel E. Ramey and John W. Holmes were defendants, and the said John W. Holmes has appealed from said judgment to the Supreme Court of Indiana, and has obtained a supersedeas in said case: Now, if the said appellant will duly prosecute his said appeal, and abide by and pay the judgment and all costs which may be rendered or affirmed against him, then the above obligation to be null and void; else to be and remain in full force and effect.

“In witness whereof we have hereunto set our hands and seals, this 11th day of November, 1876.

“JOHN W. HOLMES. [SEAL]

“E. C. EMERY. [SEAL]

“Filed November 11th, 1876.

“JOHN SCOTT, Clerk.”

That thereupon the said sheriff stayed the sale of the mortgaged property upon said execution and order of sale, and on the 13th day of November, 1876, returned the same unsatisfied, after which all further proceedings upon said judgment were stayed until the November term, 1878, of the Supreme Court, when said judgment was affirmed by that court; that afterwards, at the May term, 1879, of the Jackson Circuit Court, the opinion and judgment of the Supreme

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Court in the cause were spread upon the proper record of said Jackson Circuit Court ; that at the time the order of the Supreme Court staying all further proceedings on the judgment appealed from was issued, the mortgaged property included in the decree of foreclosure was of the value of \$1,000 ; that the defendant Holmes continued in the possession and use of said mortgaged property from that time, under such order staying proceedings, until the 12th day of April, 1880, and that during that period of time he so used and abused said property that it became comparatively worthless and of no value as a security for the judgment, for the payment of which it had been decreed to be sold ; that the other defendants James Ramey and Daniel E. Ramey were during all that period of time and have ever since continued to be, insolvent ; that on the 22d day of November, 1879, another execution and order of sale was issued upon said judgment by the clerk of the Jackson Circuit Court to the sheriff of said county of Jackson, upon which said mortgaged property was duly advertised and sold by said sheriff for the sum of \$265 ; that, after deducting said sum and certain other payments which had been made on said judgment, there was due and unpaid thereon, on the 12th day of April, 1879, the sum of \$302.05, which sum, with accrued interest, still remained unpaid. Wherefore judgment was demanded.

A demurrer was sustained to the complaint, and, upon further proceedings, final judgment was rendered in favor of the defendants upon demurrer.

The plaintiff, appealing, insists that the court erred in sustaining the demurrer to the complaint.

The complaint might have been made more certain and specific as to the circumstances attending the execution and approval of the appeal bond in suit, but the appellee makes no question upon the complaint in that respect, and, consequently, we have not considered whether, for that reason, the complaint was bad upon demurrer.

As bearing, however, upon the question thus suggested, it

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may be remarked that this case differs in some material respects from the cases of *Ham v. Greve*, 41 Ind. 531, and *Buchanan v. Milligan*, 68 Ind. 118, and especially in the fact that those cases were upon bonds executed to perfect appeals taken in term time, and not to obtain a supersedeas after the close of the term, as in this case, and in the further fact that in this case a stay of proceedings is charged to have resulted from the execution of the bond sued on.

The appellees claim, on their part, that, as no personal judgment was rendered against Holmes in the original action, the bond executed by them, in legal effect only restrained the appellant from selling the mortgaged property during the pendency of the appeal to the Supreme Court, and secured the payment of such costs as might be adjudged against Holmes by that court, and that, as it was shown by the complaint that the only judgment rendered against Holmes upon the appeal was for costs, and that all the costs taxed in the cause had been paid by the sale of the property and otherwise, it was thus made to appear upon the face of the complaint that the condition of the bond had been performed.

There is some plausibility in the construction contended for by the appellees, but it is one which, we think, we would not be justified in adopting.

Although there was no personal judgment against Holmes, he was, nevertheless, a defendant in the action, and the fair inference from the averments of the complaint is that he was either the owner of, or had some claim upon, the mortgaged property, or had some interest in the subject-matter of the action.

To entitle him to the full benefit of his appeal, it was necessary that he should have a stay of proceedings as to the sale of mortgaged property, and that, in the very nature of things, involved a stay of proceedings upon the entire judgment. The stay of proceedings granted to Holmes, in aid of his appeal, was, for that reason, properly made applicable to the personal judgment against the Rameys as well as to the de-

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cree of foreclosure, and the bond must be construed as having been given to indemnify the appellant to at least the extent to which he was liable to be injured by the appeal, as also to secure the payment of the costs which might be adjudged against Holmes in this court.

The construction contended for by the appellees would, upon the facts averred, leave the appellant without any adequate remedy for the injury to him inflicted by the appeal, and would, as a precedent, practically destroy the value of an appeal bond in a case like this.

It is not necessary that an appeal bond shall be signed by all the judgment defendants. *Railsback v. Greve*, 58 Ind. 72.

The facts as to the relation of Holmes to the original action, and to the mortgaged property, are so meagerly stated that we do not feel justified in intimating what ought to be the measure of damages in case of an ultimate recovery in this action, but we are of the opinion that the complaint contained facts sufficient to make a cause of action against the appellees.

This case is distinguishable in some material respects from that of *Willson v. Glenn*, 77 Ind. 585. Amongst other differences, there was no personal judgment against any one, nor was any injury to the mortgaged property charged in that case. *Jones v. Droneberger*, 23 Ind. 74; *Railsback v. Greve*, 49 Ind. 271.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 9752.

MEREDITH v. EWING.

PARTNERSHIP.—*Suits between Partners.*—A partner can not maintain a suit against his co-partner for a share of the profits, nor upon a claim arising from the partnership business, until there has been an accounting and final settlement.

85	410
183	38
85	410
183	618
85	410
139	183
85	410
158	206

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SAME.—Accounting.—A partner may compel an accounting, and may recover the sum found due him upon final adjustment of the partnership affairs.

SAME.—Contract of Dissolution.—A partner may compel compliance with a contract of dissolution and recover a sum due him under its provisions.

SAME.—Pleading.—M. and E., having been partners, made a contract of dissolution, by the terms of which M. took the personal property of the firm, at a fixed price, and assumed its liabilities, it being agreed that, if the latter exceeded the price of the property, E. should pay half of the excess, and, if less, M. should pay E. half of the difference. The debts were in excess of the price of the property. A complaint by M. against E. to compel the latter to pay half of such excess, which does not allege that M. has paid the whole, is bad on demurrer.

From the Decatur Circuit Court.

J. S. Scobey and D. Watts, for appellant.

W. A. Moore and B. F. Bennett, for appellee.

ELLIOTT, J.—It is settled that one partner can not maintain an action against his co-partner for a share of the profits, upon a claim growing out of the partnership business, until there has been a final accounting and settlement. *Page v. Thompson*, 33 Ind. 137; *Skillen v. Jones*, 44 Ind. 136.

One partner may, however, maintain an action to compel an accounting, and to recover such sum as may be found due him upon the final adjustment of the partnership affairs. *Briggs v. Daugherty*, 48 Ind. 247.

A partner may compel the performance of an agreement of dissolution, and may recover a balance due him under the provisions of such contract. *Snyder v. Baber*, 74 Ind. 47.

We do not agree with the appellee that the complaint is to be construed as simply seeking to recover a balance due upon an unsettled partnership account, and is to be summarily disposed of under the first proposition stated. We regard it as proceeding upon the theory that there has been a settlement, and the question, therefore, is whether it states facts sufficient to entitle the appellant to maintain such a suit.

The complaint alleges that the terms of the partnership were expressed in a written contract, which is set out; that

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it was continued for about eighteen months, when it was dissolved by mutual agreement, expressed in the following writing: "The partnership of Meredith and Ewing, in the keeping of the Seitz House, is this day dissolved by mutual consent, and the said Ewing retires therefrom, and Meredith continues the business. The personal property of the firm is invoiced at the sum of \$1,642.00. The interest of Ewing in said property hereby passes to the said Meredith, he, Meredith, assumes the debts and liabilities of the firm, and should these exceed the said invoice, said Ewing is to pay one-half of the excess; but should there be less than \$1,642.72, then said Meredith shall pay to Ewing one-half of the surplus of said sum left after paying such debts and liabilities. The uncollected claims due said partnership shall remain the joint and equal fund of both, to be by each accounted for as collected, less the necessary expense of collection. Should any liability exist or recovery be had against said parties, or either of them, growing out of the settlement of the firm business, such liabilities shall be paid by the partners equally, with the costs and expenses attending the same." It is also alleged that the appellee failed to comply with the terms of the contract of partnership; that since the dissolution the appellant has paid on the partnership liabilities a sum more than equal to the invoice, and that there remains yet unpaid, of said indebtedness, the sum of \$2,500, which is justly due from the appellee to the creditors of the firm.

We do not think that the appellant has any right to go behind the contract of dissolution, for there is no charge of fraud or mistake. Where partnership affairs are adjusted and settled by mutual agreement, the settlement will stand unless fraud or mistake is alleged and proved. *Lindley Partnership*, *967, and auth. in *n.* The complaint can not, therefore, be sustained upon the ground that it makes a case for a final accounting. If there is any case made it must be upon the agreement of dissolution.

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The agreement of dissolution terminated the partnership, and provided the measure for adjusting the rights of the partners. No action can be maintained on this agreement, unless it is shown that there has been a breach by the appellee and performance by the appellant. Like all other cases upon contracts, two essential things must be shown in order to entitle the plaintiff to his action: performance by him and a breach by his adversary.

The agreement provides that the appellant shall assume and pay the liabilities of the partnership; that, in case they exceed the value of the property taken by him under the contract, then the appellee shall pay one-half of the excess; and it is claimed that this stipulation creates a cause of action in appellant's favor without payment by him of the liabilities assumed. In our opinion this position can not be maintained. The appellant expressly agreed to pay all partnership liabilities, and, in consideration of this promise, succeeded to the business of the firm, and obtained his partner's interest in the property. He is not in a situation to sue his partner, because he himself has not performed his contract. Having bound himself to pay all partnership debts, he must perform his agreement before he can maintain an action upon the contract against his former partner. The appellee is bound to the creditors of the partnership, and the appellant certainly can not claim that he is also his debtor; to permit this would be to hold that one and the same liability gave to different parties, claiming under distinct and different rights, a right of action against the same person. But it is needless to pursue the discussion; the language of the contract is plain. Meredith bound himself to pay all debts and to look to the appellee for reimbursement in case they exceeded the amount of the invoice, and, until he has done that which he agreed to do, he can not maintain an action.

No breach of the contract of dissolution is shown. The appellee did not bind himself to pay any partnership debts.

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On the contrary, it was the appellant himself that assumed this burden. As the former made no promise to pay these debts, the allegation that he did not pay them shows no breach. Judgment affirmed.

85	414
131	345
85	414
147	87

No. 9633.

THOMPSON, ADMINISTRATOR, ET AL. v. EDWARDS, TRUSTEE.

PLEADING.—*Complaint to Foreclose Mortgage.—Decedents' Estates.*—The names of the parties to a suit, being named in the first paragraph of a complaint, need not be repeated in subsequent paragraphs; so that in an action to foreclose several mortgages executed by a decedent, a second paragraph of the complaint alleging that he died, "leaving the widow and heirs at law named in the first paragraph of this complaint," is not objectionable.

TRUSTS.—*Statute Construed.—Constitutional Law.*—Section 2988, R. S. 1881, requiring trustees to be residents of this State, has no retrospective operation according to its terms, nor could the Legislature have given it such operation without impairing the validity of contracts previously entered into.

CONTRACT.—*Mortgage.—Conflict of Laws.*—A resident of this State applied to a resident of New York for a loan. Notes and a mortgage on lands here were executed here, and the money paid to the borrower here, some of the notes being payable in New York and others specifying no place of payment.

Held, that the contract, as to its validity, must be tested by the laws of Indiana.

From the DeKalb Circuit Court.

R. W. McBride, for appellants.

C. A. O. McClellan, for appellee.

NIBLACK, J.—Suit by Jonathan Edwards, trustee of the Equitable Trust Company, of New London, Connecticut, against Francis E. Thompson, as administrator of the estate of Samuel H. Smith, deceased, and twenty-six other persons, comprising the widow and heirs at law, and junior encumbrancers on the property, of the said Samuel H. Smith, to fore-

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close three mortgages executed by said Smith and his wife in his lifetime.

The first mortgage was executed on the 28th day of September, 1875, upon certain lands in DeKalb county, in this State, to secure a loan of \$2,000, for the repayment of which two bonds, of \$1,000 each, bearing seven per cent. interest, with coupons attached, were also executed.

The second mortgage was executed on the 8th day of June, 1877, upon other lands in DeKalb county, to secure a second loan of \$4,000, for the repayment of which bonds bearing interest at the rate of seven per cent., and accompanying interest notes, were likewise executed.

The third mortgage was executed on the same day, and upon the same lands as the second mortgage, to secure the payment of the interest notes for the accruing interest on the second loan. No place of payment was specified as to the principal sums for the repayment of which the bonds were executed, but the coupons and interest notes were made payable at the office of the Equitable Trust Company in the city of New York.

The complaint was in two paragraphs. The first paragraph demanded the foreclosure of the first mortgage, and the second the foreclosure of the second and third mortgages, for alleged breaches in some of the conditions of the several mortgages. Demurrers were overruled to both paragraphs of the complaint. The defendants, other than the junior encumbrancers, answered:

First. In general denial.

Second. In abatement of the action, "that Jonathan Edwards, trustee and plaintiff in this action, was not, when said action was commenced, nor is he now, a resident of the State of Indiana, but then was and still is a resident of the State of New York."

Third. That the contracts concerning the loans, which the mortgages were given to secure, were made in the State of New York, and at nine per cent. interest, and that because a greater rate of interest than seven per cent. had been reserved,

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such contracts were usurious and void, setting out a copy of the statute of New York on the subject of interest and usury.

Fourth. Setting up in a different form substantially the same defence made by the third paragraph.

A demurrer was sustained to the second paragraph of the answer, and issue was joined on the third and fourth paragraphs. The court tried the cause, and made a general finding for the plaintiff. A new trial was refused, and a decree of foreclosure entered upon all the mortgages.

Questions are made here :

First. Upon the overruling of the demurrer to the second paragraph of the complaint.

Second. Upon the sustaining of the demurrer to the second paragraph of the answer.

Third. Upon the refusal of the court to grant a new trial.

The complaint, in its title, gave the names of all the parties, plaintiffs as well as defendants, in full.

The first paragraph, after setting out the execution of bonds, coupons and mortgages upon which it relied as a cause of action, averred that the mortgagor, Samuel H. Smith, had died intestate, leaving certain of the defendants, particularly naming them, as his widow and only heirs at law.

The second paragraph, after setting out in like manner the bonds, notes and mortgages upon which it was based, averred that the said Samuel H. Smith had "died intestate, leaving the widow and heirs at law named in the first paragraph of this complaint."

The appellants, who comprise the widow and heirs and administrator of the decedent, Smith, claim that the second paragraph of the complaint was bad upon demurrer, because it did not repeat the names of the widow and heirs referred to as above by it, upon the ground that each paragraph of a pleading must be sufficient of itself, and can not be aided by the averments of another paragraph. *Smith v. Little*, 67 Ind. 549.

The rule, that each paragraph of a complaint must within itself contain a good cause of action, is in every way a proper

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rule, and one well recognized by the authorities; but it does not go to the extent of requiring the repetition of the names of parties which have been previously given in full, either in the title of the cause or in some preceding paragraph; nor does it apply to cases where one paragraph refers to another for the purpose of the mere identification of some person or thing which is common to both paragraphs. *Lowry v. Dutton*, 28 Ind. 473.

If some uncertainty shall arise for want of such a repetition or by reason of such a reference being defectively made, the defect is not one of substance, but is of a character which can be easily remedied by having the attention of the court properly called to it for that purpose. Any less liberal construction of the rule, stated and recognized as above, would require the filing of a separate copy of every instrument in writing sued on, with each paragraph of the complaint. We think that, under the circumstances as they were made to appear by the whole pleading, the court did not err in overruling the demurrer to the second paragraph of the complaint.

By an act relating to "trusts and powers," approved March 29th, 1879, Acts 1879, Special Session, p. 225, it is provided that, "after the taking effect of this act, it shall be unlawful for any person, association or corporation to nominate or appoint any person a trustee in any deed, mortgage or other instrument in writing, except wills, for any purpose whatever, who shall not be at the time a *bona fide* resident of the State, of Indiana, and it shall be unlawful for any person who is not a *bona fide* resident of the State, to act as such trustee."

The appellants also claim that, upon the passage of this act, the appellee became incapable of acting longer as trustee under the mortgages in suit, and that hence the second paragraph of their answer ought to have been held sufficient as an answer in abatement. Waiving all discussion as to the power of the Legislature to enact such a statute as applicable to trustees to be thereafter appointed, it is manifest, from a most

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casual reading, that the act in question was not intended to have any retrospective effect, or to in any manner impose disabilities upon trustees already appointed. Such an effect could not be given to it, whatever its particular phraseology might have been, without impairing the obligation of contracts previously entered into, and the States are inhibited from enacting any law which would work such a result. U. S. Constitution, Article 1, sec. 10. There was consequently no error in sustaining the demurrer to the second paragraph of the answer.

It was made to appear by the evidence that on or about the 3d day of September, 1875, the decedent, Smith, forwarded to the Equitable Trust Company, doing business in the city of New York, through Coombs, Morris & Bell, practicing attorneys of the city of Fort Wayne in this State; an application for a loan of \$2,500 for five years, at nine per cent. interest, offering to secure the desired loan by a first mortgage on the real estate in DeKalb county described in the mortgage afterwards first executed by him, and representing himself to be domiciled in the State of Indiana, and to be residing on said real estate; that the said Smith also represented that he wished to obtain said loan to enable him to remove encumbrances from said real estate, and to make improvements thereon; that the trust company examined the application thus made at its place of business in the city of New York, and on the 21st day of September, 1875, informed Coombs, Morris & Bell, by a letter addressed to them at Fort Wayne, that it would loan Smith \$2,000 upon his application, to date from the first of May previous, upon two bonds of \$1,000 each, at nine per cent. interest, two per cent. in advance, to be deducted from the sum loaned, and seven per cent. semi-annually as per coupons to be attached to the bonds, upon its being made to appear to said Coombs, Morris & Bell that the real estate was free from encumbrances and that the title thereto was perfect, to all of which Smith assented; that Coombs, Morris & Bell thereupon, at their office in the city of Fort Wayne, exam-

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ined the title to said real estate and found it complete except as to certain encumbrances which Smith was to pay out of the proceeds of his loan ; that afterwards, on the 28th day of September, 1875, Smith executed the bonds, coupons and mortgage described in the first paragraph of the complaint, and delivered them to Coombs, Morris & Bell, who forwarded them to the appellee in the city of New York, and who at Fort Wayne, pursuant to the previous order and direction of the Equitable Trust Company, drew their draft on that company at the city of New York in favor of Smith for the sum of \$2,000, less the discount of two per cent. interest thereon ; that on the same day Coombs, Morris & Bell, upon the endorsement of Smith, procured said draft to be discounted at its face at the Hamilton Bank in the city of Fort Wayne, and placed the proceeds on their books to the credit of Smith, to whom they accounted for the full amount within a few days thereafter, first paying the encumbrances on the mortgaged real estate, which were to be discharged out of the proceeds of said loan ; that the draft was thereafter, upon the receipt of the bonds, coupons and mortgage, and in due time, paid by the trust company ; that Smith, at the time of his application, and before and afterwards, resided on the land included in the mortgage, and that the net proceeds of the loan were principally, if not entirely, expended on that land.

It was further made to appear by the evidence that the decedent, Smith, in June, 1877, through the agency and intervention of Coombs, Morris & Bell, obtained a second loan from the Equitable Trust Company for the sum of \$4,000 on the bonds, interest, notes and mortgages referred to and described in the second paragraph of the complaint, and that such loan was made upon proceedings substantially similar to those which resulted in the consummation of the first loan ; that at the time he obtained this second loan Smith still resided in DeKalb county, and that said loan was obtained ostensibly to discharge an existing mortgage upon the mortgaged

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lands, which were also situate in said county of DeKalb, and to erect another barn thereon.

The appellants further claim, that the legal inference from the facts disclosed by the evidence is, that the loans were made, and all contracts concerning the same constructively executed, in the State of New York, and that such contracts thereby became what they denominate New York contracts, that is to say, contracts made with reference to the laws of New York, and hence usurious and void, because a greater rate of interest than seven per cent. was reserved; that, consequently, the finding of the court was not sustained by the evidence, and a new trial ought to have been granted.

It is often difficult to determine by what law a contract ought to be governed, which has been entered into in one State and is to be performed either in whole or in part in another State, or where the contracting parties reside in different States; and, as bearing upon that general subject, there is a palpable conflict between many of the decided cases as well as between some authors who have written upon it. In construing such contracts with reference to the law which is to govern them, we are to look mainly to the real intentions of the parties, and to their acts expressive of such intentions.

The general rule is, that where interest is to be paid on a contract, either expressly or impliedly, it must be paid according to the law of the place at which the contract is to be performed. But the question of the greatest difficulty often is to ascertain where, under all the circumstances, the contract is to be performed, having reference to the principal object which the parties had in view in entering into it.

The question whether a contract is usurious does not depend upon the rate of interest allowed, but upon the validity of the interest stipulated for by the contract in the country in which it is made and is to be executed. Story Conflict of Laws, sections 291, 292, 293.

Rorer on Inter-State Law, at page 48, states the rule to be that "A note made in one State, at a rate of interest lawful in

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that State, and secured by a mortgage lien on lands situated in such State, and which instruments were for money loaned by a citizen of a different State, and were delivered to him in such other State where the contract of loan was agreed to, was held to be legal and enforceable in the courts of the State where the land was situate, and where the debtor resided at the time of making the contract, as also of enforcing the same, although such instruments called for a greater interest than allowed by law in the State where the contract was agreed on and the instruments were delivered, and although in such latter State a forfeiture of the debt is incurred for usury. The ruling was that the whole transaction had reference to the laws of the State where the land was situate, the debtor resided, and the instruments were made, although the latter were delivered elsewhere, as above stated, and notwithstanding, also, that the notes were made payable in a still different State than that wherein they were made or delivered, or wherein either party resided. Thus, a note, and mortgage made in Michigan to secure the same, on real property therein situated, calling for interest at ten per centum per annum, a rate of interest legal in Michigan, is binding and valid, although the note be payable in New York, where such interest is usurious. Such a contract is a Michigan and not a New York contract, and is therefore governed by the laws of Michigan as to its validity."

The rule thus stated by Rorer is a mere synopsis of some leading cases on the subject to which it has reference, and appears to us to be one not only founded in reason and in justice, but supported by the evident weight of authority.

Applying the principles announced as above to the case at bar, we think the plain inference from the evidence is that the bonds, coupons, interest notes and mortgages in judgment were executed within this State, and with reference to the laws of this State, thus making them in every essential respect Indiana contracts, and that, consequently, the usury laws of New York had no application as a defence to this suit. Wharton Conflict of Laws, secs. 508, 509, 510; *Arnold*

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v. *Potter*, 22 Iowa, 194; *Chapman v. Robertson*, 6 Paige, 627; *Pine v. Smith*, 11 Gray, 38; *Bank, etc., v. Lewin*, 45 Barb. 340; *Levy v. Levy*, 78 Pa. St. 507 (21 Am. R. 35); *Fitch v. Remer*, 1 Biss. 337; *Philadelphia Loan Company v. Towner*, 13 Conn. 249.

The judgment is affirmed, at the costs of the appellants.

No. 8508.

COX ET AL. v. STOUT, ADMINISTRATOR.

JUDGE.—*Postponement of Trial.*—*Practice.*—Objection to the action of the court in setting down a cause for immediate trial before a judge specially appointed to try the cause is not available in the Supreme Court unless the grounds of objection are shown by bill of exceptions.

PRACTICE.—*Continuance.*—There is no error in overruling a motion for delay of a cause, when no reason for delay is shown.

JUDGMENT.—*Decedents' Estates.*—An application to enforce a judgment against a decedent's estate, made under section 621, R. S. 1881, can not be objected to by the tenant of real estate against which the judgment is sought to be enforced on the ground that it fails to show whether or not there were assets in the hands of the administrator.

EVIDENCE.—*Record Reinstated.*—Where the record of a judgment, which has been destroyed, has been reinstated, it is admissible to prove the judgment, without producing also the pleadings.

SAME.—*Judgment.*—*Injunction.*—In an application to enforce a judgment under section 621, R. S. 1881, it is not error to put in evidence a record showing that there had been an injunction restraining the sale on execution of lands to satisfy the judgment.

SUPREME COURT.—*Practice.*—*Error.*—That a demurrer has been sustained to the answer of a defendant who does not appeal, can not be available error to another defendant who does appeal.

SAME.—An error which does not seem to have injured a defendant who appeals, there being others who do not appeal, is not available.

EVIDENCE.—*Practice.*—Where evidence has been admitted without objection, or without any ground of objection having been stated in the court below, no question can be made upon it in the Supreme Court.

SAME.—An objection to evidence, that "it is inadmissible and incompetent," is too indefinite to present any question.

From the Orange Circuit Court.

Cox *et al.* v. Stout, Administrator.

J. Baker and W. W. Spencer, for appellants.

J. H. Stotsenburg, for appellee.

BLACK, C.—Leonidas Stout, administrator of the estate of Eliza Bowles, deceased, brought this proceeding, and on the 5th of December, 1878, filed his amended complaint against James F. Stucker, administrator of the estate of William A. Bowles, deceased, Julia Bowles, his widow, William A. Dill and Mary M. Dill, grandchildren of said William A. Bowles, deceased, Nancy Cox and her husband, Joseph Cox, and Samuel Ryan, alleging, in substance, that said Eliza Bowles in her lifetime, being the wife of said William A. Bowles, instituted in the court below an action against her said husband for a divorce and alimony, and on the 7th of December, 1868, in said action, a judgment was rendered in her favor for a divorce, and for alimony in the sum of \$25,000, and for costs; that on the 18th of February, 1870, said Eliza died intestate, said judgment remaining wholly unpaid; that afterwards said Leonidas Stout was appointed administrator of her estate, and qualified as such; that afterwards, said judgment remaining wholly unpaid, the entire files, papers, pleadings, and all the record of the orders of said court in said cause, and of the judgment and decree of said court therein in favor of said Eliza Bowles and against said William A. Bowles, were feloniously destroyed and stolen by some unknown person in and from the clerk's office of said court; that afterward said administrator of the estate of said Eliza, upon motion and notice to said William A. Bowles, procured said judgment to be reinstated of record in said court, on the 7th of December, 1870, and a copy of the entry of final judgment is made part of the complaint; that at the date of the rendition of said judgment said William A. Bowles was the owner in fee simple of certain parcels of real estate in said county of Orange, and said parcels are described, being in all forty-three parcels; that said judgment, at the date thereof, became and had since remained a lien upon all said real estate; that after the

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rendition of said judgment said William A. Bowles married the defendant Julia Bowles, and thereafter, on the 23d of March, 1873, he died intestate, leaving said Julia his widow, by whom he had no issue, and leaving as his only heirs the defendants William A. Dill and Mary M. Dill, who were his grandchildren, being the children of his deceased daughter; that afterward, on the 28th of April, 1873, letters of administration upon his estate were granted in said court to Julia Bowles and Joseph Cox, who were afterward, on the 27th of November, 1874, removed by said court from said trust, and on that day the defendant James F. Stucker was by said court appointed administrator *de bonis non* of the estate of said William A. Bowles, deceased; that said Stucker qualified and gave bond as such administrator, and had ever since been and still was the administrator of said estate; that said judgment in favor of said Eliza Bowles for alimony, principal, interest and costs, remained due and wholly unpaid, and there remained due thereon \$41,000; that said real estate descended to said widow and grandchildren, subject to the lien of said judgment, and said lien was still upon all said lands; that the plaintiff was restrained from levying upon or selling any property upon said judgment for fifteen months by reason of the death of said William A. Bowles, during which time (until one year after the taking out of letters of administration upon his estate) the plaintiff could not proceed; that the defendants Nancy Cox and Joseph Cox claimed some interest in and to some portion of said real estate, but what interest and what part plaintiff was unaware; that whatever interest they or either of them had, it was subject to the lien of said judgment; that the defendant Samuel Ryan also claimed some interest in some part of said real estate.

Prayer that all said defendants might be summoned to show cause why the amount due on said judgment should not be enforced against said lands in their hands respectively, that the plaintiff might be allowed to issue an execution upon said judgment and levy the same upon and sell said real estate

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thereon, or so much thereof as might be necessary, and for all other and proper relief.

The complaint was verified by the affidavit of one of the plaintiff's attorneys.

The term of office of Hon. Eliphalet D. Pearson, judge of the Orange Circuit Court, expired on the 2d of October, 1879, said cause not having been disposed of because of a change of judge granted on affidavit of one of the defendants, and the failure of other judges, appointed at different times, to attend. Hon. Francis Wilson, who became the successor in office of Judge Pearson, and entered upon his duties as judge of said court on the day last mentioned, was disqualified from acting as judge in this cause, by reason of his having been an attorney therein. On the 23d of October, 1879, he appointed Hon. Samuel E. Perkins, then a judge of this court, to try said cause, and, over the objection of the defendants, it was set down before him at that term, for the making of issues and trial as it stood upon the docket. The same day Judge Perkins appeared and took the bench and called said cause. The defendants objected to proceeding in any way at that time before said judge. The objection having been overruled, they demurred to the complaint for want of sufficient facts. The demurrer was overruled.

Issues having been made, they were tried by the court. The finding was in favor of the plaintiff. The defendants moved for a new trial. The motion was overruled, and judgment was rendered that said judgment for alimony be renewed and enforced as against the interest of said William A. Bowles in said real estate and as against his estate in the hands of the defendants respectively, and his said administrator was ordered to pay any money in his hands belonging to said estate to the plaintiff upon said judgment within thirty days; and it was adjudged that if said judgment were not paid within thirty days, the plaintiff should have execution thereon, with a copy of this order, upon which judgment and order it should be the duty of the sheriff to sell said real estate, etc.

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The defendants appealed to this court, except said Stucker, administrator, who declined to join in the appeal, of which he has been notified. In this court, all the appellants, except Joseph Cox and Nancy Cox, have formally dismissed their appeal, and said Joseph Cox and wife alone remain as appellants.

The following are the alleged errors assigned;

“1. The court erred in setting down said cause for immediate trial before Hon. S. E. Perkins, over the objection of the defendants.

“2. The court erred in overruling the demurrer of the defendants to the plaintiff's affidavit or complaint.

“3. The court erred in requiring the defendants to proceed with the trial of said cause immediately after the appointment of said Samuel E. Perkins to try said cause, over the objection of the defendants.

“4. The court erred in sustaining the demurrer to the fourth paragraph of the answer of the defendants William A. Dill and Mary M. Dill.

“5. The court erred in overruling the plaintiff's motion for a new trial.”

The grounds of objection to the action of the court in setting down the cause before Hon. Samuel E. Perkins are not shown by bill of exceptions. Therefore, whether such action of the court as that mentioned in the first specification can be thus assigned as error, or should be made a cause in a motion for a new trial and brought to the attention of this court by assigning the overruling of that motion as error, the objection to the order can not be considered.

The objection made before Judge Perkins, to which the third specification in the assignment of errors relates, was, as shown by the bill of exceptions, an objection, not to his authority, but to proceeding in the cause at that time. It was not shown or claimed that the defendants were unprepared in any respect, or that they could or would be better prepared at any future time, or that they would be in any way injured by proceeding to complete the issues and try the cause without

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further delay. The objection amounted merely to an application for delay, without any attempt to show need of delay. Therefore, if the refusal of a postponement may properly be assigned as error independently, it does not appear that the appellants were injured, or that the court erred.

Section 642 of the code of 1852 provided, as does section 621, R. S. 1881, that "In case of the death of any judgment debtor, the heirs, devisees, or legatees of such debtor, or the tenant of real property owned by him and affected by the judgment, and the personal representatives of the decedent, may, after the expiration of one year from the time of granting letters testamentary or of administration upon the estate of the decedent, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively."

Section 643 of the code of 1852 provided, as does section 622, R. S. 1881, that "The judgment creditor, his representatives or attorney, shall file an affidavit that the judgment has not been satisfied, to his knowledge, or information and belief, and shall specify the amount due thereon, and the property sought to be charged."

By the provisions of section 527 of the code of 1852, which are the same as those of section 608, R. S. 1881, the judgment mentioned in the complaint would be a lien upon real estate and chattels real, liable to execution thereunder in the county of Orange, where the judgment was rendered, for ten years after the rendition thereof, and no longer, exclusive of the time during which the plaintiff might be restrained from proceeding thereon by any appeal or injunction, or by the death of the defendant, or by agreement of the parties entered of record.

The only objection made in argument under the second assignment of error is that the verified complaint or affidavit upon which the summons to show cause was issued does not allege that the administrator of the estate of William A. Bowles, deceased, had any personal assets in his hands which should be applied to the payment of the judgment before the

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lands should be subjected to execution, or that he had no assets, or that he had assets which were insufficient to pay said judgment.

A party summoned is to show cause why the judgment should not be enforced against the property in his hands. If it is sought to charge any specific property, it should be designated. If the judgment ought not to be enforced against property in the hands of one of the defendants because it ought to be paid with assets primarily liable in the hands of another person, this would seem to be proper matter for such defendant's answer.

Though, in pursuance of the words of the statute, the personal representative be summoned, if he in fact have no assets it could make no difference to other defendants that this fact was not alleged in the affidavit, and if he have assets which should be applied on the judgment, such application would lessen the burden of the other defendants, and, therefore, would be matter of defence for them; and his possession of such assets would not seem to lie more in the knowledge of the plaintiff, whose averments must be made under oath, than in that of the tenant of real property.

Whether in such a case it is always necessary to make the personal representative a party, or whether a demurrer of the personal representative would lie for failure of the affidavit to specify assets in his hands, we need not say. The statute requires that the affidavit shall specify the property sought to be charged, and the verified complaint was not bad as against defendants claiming an interest in specified property sought to be charged, because it did not allege that another defendant, the administrator of the estate of the judgment defendant, had assets in his hands, or the contrary. The complaint was sufficient to require appellants to show cause.

If there was any error in sustaining the demurrer to the separate answer of William A. Dill and Mary M. Dill, as to which we have not examined, they now acquiesce in the ac-

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tion of the court, and it could not avail the appellants Cox and Cox.

It is suggested by counsel that we should disregard the last specification of the assignment of errors, because the motion for a new trial is therein referred to as the plaintiffs' motion. It seems to have been intended to thus designate the plaintiffs in error, though in other specifications the word "defendants" is used to designate the same parties. We have examined the causes stated in the motion, and we have found no error.

The only reason urged by counsel why the finding was not sustained by sufficient evidence, or was contrary to law, is, that "to several of the tracts of land that the court finds that Bowles died seized of, there is no evidence whatever that Bowles owned them."

The court found that Bowles died seized of forty-three tracts of land in said county. The evidence covers about two hundred and seventy pages of the record. It would seem that counsel should at least have designated the tracts as to which they suppose the evidence to have been insufficient. It is not intimated that any of the tracts so referred to in argument were those in which appellants claimed an interest, and it could not harm them if other real estate, which Bowles did not own, was found to be subject to the judgment.

The other causes stated in the motion for a new trial related to the admission of evidence. It is claimed that there was error in admitting in evidence the record of the cause wherein the record of the judgment for alimony was restored.

The objection to this evidence stated in the court below was, that the pleadings in the original action were not shown thereby. It was not necessary or proper for the court, in reinstating the judgment, to reinstate the pleadings or to perpetuate the evidence of their existence or contents. *Spears v. Work*, 29 Ind. 502. But the reinstated judgment had the same force and effect that the original judgment would have had if its record had not been destroyed. 1 R. S. 1876, p. 766, sec. 22. An execution might have been issued upon it before the death

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of the judgment defendant, and within ten years after its original rendition; and after his death there might be a revivor of the judgment, so that execution could be issued upon it without proof of the pleadings in the original action. It was not improper to prove the existence of the judgment as alleged in the complaint.

It is next insisted that the court erred in admitting the record of a cause in which the appellee and the sheriff were enjoined from selling certain lands mentioned in the verified complaint in this proceeding; under an execution issued on said judgment for alimony.

By this evidence, one of the grounds provided by the statute for an extension of the period of the lien of the judgment was shown, and there was no error in its admission.

It is also claimed that there was error in the admission of the records of two other actions. But, as to one, it does not appear that there was any objection made in the court below, and, as to the other, it is not shown that any ground of objection was stated to the court.

It was assigned as a cause in the motion for a new trial, that the court erred in admitting Stout's evidence. The record shows that the appellee was "examined as a witness," but does not show that he was introduced by either party, or by whom he was examined. No ground of objection to his being examined or to his testimony, or any part thereof, appears to have been stated.

The only other ground stated in the motion was the admission in evidence of an inventory. Stucker, the administrator of the estate of William A. Bowles, deceased, testified that, after his appointment as such administrator, he made an inventory of the real estate of said decedent, had it appraised, and returned the inventory to the clerk's office; and that the land described therein was the same land as that described in the complaint herein. The plaintiff was then permitted to introduce this inventory in evidence. The objection made

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thereto was that it was inadmissible and incompetent. This was not a statement of any ground of objection to the evidence. *Stanley v. Sutherland*, 54 Ind. 339, 352; *Underwood v. Linton*, 54 Ind. 468. The only objection urged here is, that the evidence was not competent under the issues, because it was an inventory of personal property. Counsel are in error, as the record plainly shows it to be an inventory of real estate only. One of the defendants admitted under oath therein and as a witness on the trial, that the real estate described in the inventory was owned by Bowles at his death, and its descriptions corresponded with those in the complaint. No ground of objection to it was stated to the court below, and none has been offered here. We can not say that the appellants were injured by the evidence.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the costs of the appellants.

HOWK, J., was absent when this cause was considered and decided.

No. 8566.

RUFF ET AL. v. RUFF.

DEMURRER TO EVIDENCE.—*Practice.*—By demurring to the evidence, in case of conflict, a party withdraws from consideration whatever is favorable to himself and consents that whatever reasonable inferences can be, shall be drawn from the evidence against him. •

SAME.—*Verdict.*—If the evidence is sufficient to sustain a verdict on appeal, it is sufficient to withstand a demurrer.

SAME.—*Contest of Will.*—See opinion for a statement of evidence deemed sufficient, on demurrer, to sustain an action to set aside a will as “unduly executed.”

From the Pulaski Circuit Court.

85	431
197	150
85	431
136	685

Ruff *et al.* v. Ruff.

M. Winfield, Q. A. Myers, J. C. Nye and N. L. Agnew, for appellants.

W. Spangler, G. Burson, S. T. McConnell and T. J. Tuley, for appellee.

WOODS, C. J.—The appellants filed objections to the admission to probate of the will of Magdalen Ruff, deceased, on the grounds of unsoundness of mind, and that the will was unduly executed. Upon the trial the appellee demurred to the evidence introduced in support of these objections. The court sustained the demurrer, and ordered the will probated. The appellants excepted.

We are of opinion that the ruling on the demurrer was wrong. It is impracticable, within reasonable limits, to give a statement of the evidence as it is set forth in the demurrer; and to give it would, as we conceive, subserve no good purpose. It is enough to say that it shows that when the will was made the testatrix was about sixty-seven years old, sick and feeble in body and mind; that she was, and for a long time had been, living with her son, the appellee, who had great influence over her, and, alone of her children, was present at the making of the will; that she had four children whom she had often declared a purpose to treat equally in respect to her property; and that her property consisted of real estate and personalty of the value of \$3,000 or more. Besides these facts, of which there can be no dispute, there was evidence tending to show that the appellee procured the will to be made. In addition to other circumstances tending to establish this, it was shown that he had frequently declared that a will should be made, or that there would be a will. There was also evidence tending to show that the testatrix did not know what estate she had, particularly large sums of money due her from the appellee and others; that the appellee had told her and made her believe that she had little or nothing besides her land, and that when the will was being drawn she made no mention of the moneys which were due her, but, with-

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out giving a reason, or speaking of her other children, said she wished to give the appellee everything; and when the will as drawn was read to her, she commenced to say something about wheat, when the appellee stopped her by saying that that could be attended to at another time.

It may be said that the evidence of undue influence is circumstantial and weak, in itself, or as compared with the evidence to the contrary, and that probably the jury would have given a verdict for the appellee; but, if this be conceded, it is at the same time evident that if, on the testimony in the record, the jury had returned a contrary verdict, and the judge who presided at the trial had rendered judgment upon it, this court, under the rule by which it acts in such cases, could not set the verdict aside for want of evidence to sustain it; and, this being so, the demurrer should have been overruled. When the evidence is such that a jury may find in favor of a party, the other party can not defeat such finding by demurring to the evidence. This, if it could be done, would defeat the right of trial by jury.

By demurring to the evidence, when conflicting, the appellee withdrew from the consideration of the court whatever was favorable to himself, and consented that whatever reasonable inferences could be, should be drawn from the evidence against him. See the following cases and cases cited: *Fritz v. Clark*, 80 Ind. 591; *Willcuts v. Northwestern Mutual Life Ins. Co.*, 81 Ind. 301; *Hagenbuck v. McClaskey*, 81 Ind. 577; *Indianapolis, etc., R. R. Co. v. McLin*, 82 Ind. 435; *Trimble v. Pollock*, 77 Ind. 576.

Judgment reversed, and cause remanded, with instructions to the court to set aside its judgment and the ruling upon the demurrer.

No. 9741.

DIXON ET AL. v. DUKE ET AL.

REPLEVIN.—*Title.—Contract of Sale.*—An answer in replevin for wheat is good which avers that the only right of the plaintiff to the wheat is conferred by a written contract, as follows: "An article of agreement, made this 25th day of September, 1879, between H. B. and D. The said D. having purchased of H. B. one hundred acres of growing wheat, at its market price per bushel when delivered * * in Kokomo, Ind., to be harvested and cared for in a good husband-like manner, and delivered in good merchantable order; sixty acres of the wheat being on the home farm where he now resides, and forty acres on the farm * * belonging to him and E. B.," and that there had been no delivery of the wheat to D. The contract was executory and passed no title.

SAME.—*Judgment.*—In replevin against several, if the plaintiff fails to show title in himself, the defendants are entitled to a joint judgment.

SALE.—*Contract.—Statute of Frauds.—Execution Creditor.*—An execution creditor can not question a sale of property made by his debtor, merely because the contract of sale is within the statute of frauds. Parties to the contract and their privies only can do so.

SAME.—*Growing Crops.—Title.—Delivery.*—Where a growing crop is sold, and either delivery or payment remains to be done, title does not pass.

EXECUTION.—*Lien.*—An execution, upon its delivery to the officer, becomes a lien on personalty, and such lien will prevail against any subsequent purchaser.

JURY.—*Contract.—Construction.*—A jury is not at liberty to find the effect and meaning of a written contract; that is the duty of the court.

SPECIAL VERDICT.—*Judgment.—Practice.*—A defendant, deeming himself entitled to judgment on a special verdict, may move for such judgment, and the question is thereby presented whether the plaintiff is entitled to judgment.

SAME.—*Burden of Proof.*—If a special verdict do not find such facts as entitle the party having the burden of proof to judgment, then a motion by the adversary for judgment should be sustained.

SAME.—A special verdict should contain only facts found, and if it states either evidence or conclusions of law, such statements should be disregarded.

From the Howard Circuit Court.

N. R. Lindsay, T. A. DeLand and J. W. Kern, for appellants.
M. Bell, W. C. Purdum, R. Vail and J. F. Vail, for appellees.

ELLIOTT, J.—The appellants instituted this action to recover seven hundred bushels of wheat.

85	434
124	88
124	451
126	44
85	434
128	417
85	434
131	298
131	299
133	119
133	161
133	237
85	434
137	620
85	434
141	513
85	434
144	321
144	606
146	153
85	434
164	347

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The answer is in two paragraphs. The first is the general denial; the second justifies the taking and detention of the wheat upon two executions issued against Henry Brunk, and alleged that it was grown upon lands cultivated by him, and was by him harvested and stored in his granary; that the executions were liens thereon, and were duly levied; that the only right, claim or interest of the appellants is that conferred by a written instrument, which is, in substance, as follows:

“KOKOMO, September, 25th, 1879.

“An article of agreement, made this 25th day of September, 1879, between Henry Brunk and Dixon & Co. The said Dixon & Co. having purchased of Henry Brunk one hundred acres of growing wheat, at its market price per bushel, when delivered at their warehouse in Kokomo, Indiana, the same to be harvested and cared for in a good husband-like manner, and delivered in good merchantable order; sixty acres of the wheat being on the home farm where he now resides, and forty acres on the farm in Jackson township belonging to him and Eli Brunk.”

It is a familiar rule that a plaintiff in replevin must recover upon the strength of his own title, and not upon the weakness of his adversary's. It follows from this, that an answer is good if it shows the plaintiff in such an action to have no title, although it may not show any in the defendant. If, then, the answer in this case shows the plaintiffs to have no title, it is sufficient, although it may not show any in the appellees.

It is averred, very fully and explicitly, that the appellants have no other title except such as the written contract confers, and that the property described in it had not been delivered to them, but was in the seller's possession when the executions were levied. The material question, therefore, is, did this contract in itself convey title? We think it very clear that it did not. It is an elementary rule that title does not pass until there has been an executed contract of sale, and there is here no such contract, for there remained two things

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to be done, delivery of the wheat in the appellants' warehouse, and payment of the agreed price. *Williams v. Smith*, 7 Ind. 559; *Moffatt v. Green*, 9 Ind. 198; *Straus v. Ross*, 25 Ind. 300; *Lester v. East*, 49 Ind. 588; *Indianapolis, etc., R. W. Co. v. Maguire*, 62 Ind. 140. As the answer stated facts constituting a bar to the action, the demurrer was properly overruled.

We do not deem it necessary to discuss the questions arising on the second paragraph of the reply, for if it were granted that it is good, no harm resulted to the appellants by the ruling declaring it insufficient, as the general denial pleaded in the first paragraph covered all matters that could have been given in evidence had the second paragraph been held good. The verdict is a special one, and at the proper time the appellees moved for judgment upon it, and their motion was sustained. We think the practice adopted is the proper one, and that a defendant who believes himself entitled to judgment on a special verdict, may move for judgment and thus present the question of its sufficiency to entitle the plaintiff to a recovery.

It is a familiar rule that a special verdict must find such facts as entitle the party having the burden of proof to a judgment. If the facts found are not sufficient to entitle a plaintiff to a judgment, then the defendant's motion for judgment should be sustained, unless the case is one where the burden is upon the defendant. In the case before us the plaintiffs had the burden, and the question, therefore, is whether the facts found are sufficient to support a judgment in their favor. The rule is, that it is the facts, and not the evidence, which are to be considered in determining the sufficiency of the special verdict. In strictness, neither a special finding nor a special verdict should contain anything except the facts, but, if facts and evidence are both stated, the court will act upon the facts and not upon the evidence. *Locke v. Merchants Nat'l Bank*, 66 Ind. 353; *Kealing v. Vansickle*, 74 Ind. 529 (39 Am. R. 101); *Woodfill v. Patton*, 76 Ind. 575.

The facts stated in the special verdict may be thus sum-

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marized: On the 20th day of September, 1879, appellants and Henry Brunk entered into a verbal contract for the sale of the wheat; that in March, 1880, the verbal contract was reduced to writing and is that set out in the answer, except that by mistake the parties omitted to incorporate the provision that appellants should make payment for the wheat to the Howard National Bank in discharge of Brunk's indebtedness to it; that the writing was dated back to September 20th, 1879; that, pursuant to the provisions of the contract, Brunk harvested the crop, and placed in sacks furnished him by the appellants for that purpose all of it except two hundred bushels, which he placed in his granary for them; that two judgments were rendered against Brunk, executions thereon issued and received by the sheriff, one of them on the 6th day of February, 1879, and one on the 19th day of May, 1880; that these executions were levied on the 12th day of July 1880; that, before the levy of the executions, Brunk had delivered sixty-two bushels of the wheat to the appellants and had entered upon the work of hauling all of it to them; that the executions were levied on twelve hundred bushels of wheat grown on the lands described in the written contract set out in the answer, and that the property was not seized under any writ nor by virtue of any tax assessment.

The findings are separated into paragraphs, and the appellants, in commenting upon them, select such only as are favorable to them; but this, it is plain, is not the correct practice. The verdict must be taken as an entirety, and all the material facts be considered together.

The verdict is silent as to payment of money upon the contract, and, as the burden was upon the appellants to establish all facts essential to a recovery, the finding must be regarded as against them upon this point. *Jones v. Baird*, 76 Ind. 164; *Henderson v. Dickey*, 76 Ind. 264; *Stropes v. Board, etc.*, 72 Ind. 42; *Ex parte Walls*, 73 Ind. 95; *Pitzer v. Indianapolis, etc., R. W. Co.*, 80 Ind. 569. The case, therefore, is to be

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treated as one in which no payment of the purchase-money has been made.

It is argued by appellees' counsel, that, as no part of the purchase-money was paid, the verbal contract was within the statute of frauds; and that this question is presented for decision by the special verdict. There are many cases where the statute may be made available without having been specially pleaded. *McMillen v. Terrell*, 23 Ind. 163; *Suman v. Springate*, 67 Ind. 115; 1 Works Pr., Pl. & Forms, 223. In *Wiswell v. Tefft*, 5 Kan. 263, it was said: "The general denial of the defendants raises the question of the statute as well as any other answer could raise it." The court in *Livingston v. Smith*, 14 How. Pr. 490, said that where the defendant puts in issue the agreement, "the plaintiff will of course fail upon the trial of that issue, unless she can prove her allegation by producing written evidence of the agreement." The same doctrine is declared in the cases of *Duffy v. O'Donovan*, 46 N. Y. 223, and *Marston v. Swett*, 66 N. Y. 206 (23 Am. R. 43). At common law, a special plea of the statute was held bad as a mere argumentative denial. 1 Chitty Pl. 500; *Elliott v. Thomas*, 3 Mees. & W. 173; *Eastwood v. Kenyon*, 11 Ad. & E. 438. Chitty says: "Under *non assumpsit*, therefore, the plaintiff must show that the statute of frauds has been complied with." We need not here enquire whether there are any cases where it is necessary to plead the statute specially, but content ourselves with holding that, in cases where the plaintiff's title to personal property, for which he brings replevin, depends upon a contract, the general denial requires him to prove a contract valid within the statute of frauds as against all persons having a right to rely upon its provisions. If he places his title upon a contract, he must show a legal one.

The appellees are right in asserting that where a plaintiff in replevin grounds his title upon a contract of sale he must show a valid contract. If the facts stated in the verdict show the contract to be within the statute of frauds, then, as against

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one having a right to rely upon the defence of the statute, the verdict will not support a judgment for the plaintiff. *Shipley v. Patton's Adm'r*, 21 Ind. 169. This necessarily results from the rule that the general denial requires the plaintiff to prove a contract executed in accordance with the requirements of the statute, and the verdict, not finding this material fact in the plaintiff's favor, is not sufficient to support a recovery by him.

The verbal contract made in September, 1879, was unquestionably within the statute, for there was no delivery, no written memorandum made, nor any earnest-money paid. *Bowman v. Conn*, 8 Ind. 58; *Carpenter v. Galloway*, 73 Ind. 418. But there are other important principles which require examination before the question of the appellees' right to judgment upon the verdict upon the ground that the contract stated is within the statute.

While it is true that a plaintiff in replevin, who relies upon a contract of sale, must establish one sufficient to pass title, it is also true that the defence of the statute of frauds can not be used against him except by a party to the contract. The defence of the statute is a personal one, and can only be made by parties or privies. *Morrison v. Collier*, 79 Ind. 417; *Ames v. Jackson*, 115 Mass. 588; *Cahill v. Bigelow*, 18 Pick. 369; *Chicago, etc., Co. v. Kinzie*, 49 Ill. 289; *Mitchell v. King*, 77 Ill. 462; *Eiseley v. Malchow*, 9 Neb. 174; *Bohannon v. Pace*, 6 Dana (Ky.) 194; *Benton v. Pratt*, 2 Wend. 588; Browne Statute of Frauds, section 135.

A creditor, seeking to subject to sale property sold to another by the debtor in good faith and for a valuable consideration, can not avoid the sale upon the ground that the contract was not evidenced as the statute requires. If the debtor should sell land to a *bona fide* purchaser, and receive the purchase-money, it would be inequitable to permit the creditor to seize it because there had been no writing or no part performance. It would not be difficult to suggest many cases where it would work great injustice to permit the creditor to

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avail himself of the benefit of the statute at the expense of his debtor's vendee, but the authorities we have referred to so fully discuss the question that no further discussion is needed from us.

The appellees are not entitled to succeed upon the ground that the special verdict shows a contract within the statute, because they have no right to interpose that defence against the purchasers from their debtor. If a contract of sale is sufficient to convey title, and its only infirmity is, that it is not executed or evidenced as the statute of frauds requires, it will defeat a creditor's claim. A contract of sale, otherwise valid and effective, can not be overthrown by the creditor upon the sole ground that the parties did not put in writing, or perform it in part.

Under our statute, the lien of an execution attaches at the time of its delivery to the officer, and it will prevail as against subsequent *bona fide* purchasers although they pay full value and obtain actual possession of the property. *Marsh v. Vawter*, 71 Ind. 22; *Griffin v. Wallace*, 66 Ind. 410; *Johnson v. McLane*, 7 Blackf. 501 (43 Am. Dec. 102); *McCall v. Trevor*, 4 Blackf. 496. If the title to the wheat in controversy had not passed to the appellants at the time the lien of the writs attached, then no subsequent contract could divest the rights of the execution plaintiffs.

It is said by appellants' counsel, that the wheat was set apart to their clients, and that there was such a delivery as consummated the contract of sale and vested title in them. This position can not be maintained, for the reason that the liens of the appellees had accrued before this was done, and whatever rights the act of setting apart gave the appellants, were subordinate to the lien of the executions. In two of the cases last cited, it was held that the lien of the execution would prevail against the title of a *bona fide* purchaser who had paid full value, and whose contract of sale was fully executed by actual delivery. If that be the correct rule in such a case, and that it is can not be doubted, it must surely be held that

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execution liens will prevail against a purchaser who has paid nothing, and has not received actual possession of the property.

Counsel are in error in supposing that a levy is essential to the existence of the lien. It is, as they say, essential to the right of possession, but when possession is taken the right relates back to the time the writ came to the hands of the officer. A sale cuts off all rights accruing subsequent to the delivery of the writ; if it were otherwise, the statute giving the lien would be without force.

Much stress is laid upon a general conclusion stated in one of the paragraphs of the verdict, that the plaintiffs are the owners of the wheat; but this conclusion can not, it is manifest, prevail against the facts. It is no part of a jury's duty to state conclusions of law, and they should always be disregarded by the court. The facts only, and not conclusions of law or matters of evidence, are to be considered in determining the sufficiency and effect of a special verdict. The facts in the verdict before us show very clearly that the conclusion stated by the jury is an erroneous one.

It is insisted by the appellants, that as there is a statement in the verdict, that the parties intended that the verbal contract should vest title at once, it must be deemed to have had that effect. This argument loses sight of the fact that the written contract merged all preceding oral negotiations. As it had the effect to merge the oral negotiations, the rights of the parties are to be determined from the words of the instrument, and not from any secret or unexpressed intention of the parties.

The construction of a written contract is for the court, and the jury have no authority to take upon themselves the work of giving the instrument a construction. It is for them to find the fact of its execution, and for the court to decide upon its meaning and effect.

There was no pledge of the property. The verdict finds that Dixon & Co. were to pay the money to the bank, but it does not find that there was any delivery as a pledge, and de-

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livery is essential to a valid pledge. But we need not further notice this point, because the contract merely provided for payment of the purchase-money to a designated person, and no right, either general or special, in the property itself was transferred.

The facts stated in the special verdict show a right in the appellees to judgment, for the reason that the appellants did not acquire title by a consummated contract of sale until after the lien of the writs had attached. Where a growing crop is sold, and some act, as the delivery to the vendee or the payment of the price, remains to be done, the title does not pass to the vendee. Benjamin Sales, sec. 675, note *d.*; Wells Replevin, sec. 191. We are not embarrassed by any question as to what the rule would be if the buyers had actually paid for the property, for here nothing was paid.

Appellants can not successfully urge that the matters of evidence and the mere conclusions of law stated in the verdict shall be considered in determining their right to a judgment, nor can they here complain that such matters were put into the verdict. If a verdict states conclusions of law and matters of evidence, the remedy is by a motion for a *venire de novo*.

It is urged that the court erred in rendering a joint judgment in favor of the defendants, but there was no error in this. Where a plaintiff institutes an action in replevin against several defendants, and fails to show title in himself, he will fail as to all of the defendants, although one only has title. In truth the plaintiff will fail if none of the defendants has title, for unless he has the title he can not recover, no matter in whom it may reside.

No objection was made to the form of the judgment in the trial court, and appellants can not, therefore, be heard to make any here.

Judgment affirmed.

Trentman *et al.* v. Swartzell *et al.*

No. 6909.

TRENTMAN ET AL. v. SWARTZELL ET AL.

PARTNERSHIP.—Judgment.—Verdict.—Attachment.—Complaint against S. and V., partners, upon an account, and to subject to the satisfaction thereof certain goods alleged to have been fraudulently transferred by S. to W. S., also a defendant. There was also an attachment by virtue of which the goods were seized and sold. V. filed a cross complaint averring the same facts alleged in the complaint. Other creditors became parties under the attachment; and, issue being taken upon the complaint and cross complaint, the jury found certain sums due from the partners to the respective plaintiffs, creditors, and for them on the question of fraud against S., and against them as to W. S., and on the cross complaint, they found for V. the plaintiff therein.

Held, that the creditors were not entitled to an order for the distribution of the proceeds of the goods; that W. S. was entitled to an order giving the proceeds to him, upon giving bond, etc., and the creditors were entitled to personal judgments against S. and V.

SAME.—Lien of Creditors.—When a partner sells his interest in partnership goods to a co-partner, the latter may apply the goods to his individual debts, and there is no lien of partnership creditors to interfere.

PRACTICE.—New Trial.—Presumption.—Where a motion for a new trial is not made at the term at which the cause is tried, but at the next term such motion is filed on leave, without objection, consent thereto will be presumed, and the motion will be in the record.

SAME.—Bill of Exceptions.—The court, having granted time for a bill of exceptions, can not, over objections, afterwards extend it.

From the Marshall Circuit Court.

C. H. Reeve, for appellants.

A. C. Capron and M. A. O. Packard, for appellees.

MORRIS, C.—Thomas E. Miller, Albert W. Green and John Joyce, partners, sued the appellees in the Starke Circuit Court, upon an account, alleging in their complaint that the appellees, Adam G. W. Swartzell and George W. Voreis, as partners, were indebted to them for goods sold and delivered, in the sum of \$1,090.50; that, after they became so indebted, Voreis sold to Swartzell his interest in the partnership property, being a stock of dry goods, etc., in consideration that he, Swartzell, would pay off and discharge all the debts of

85	443
131	108
85	443
135	611
136	647
85	443
147	319
85	443
151	428
151	429
151	430
152	457

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the firm ; that soon thereafter the said Adam G. W. Swartzell, with the fraudulent intent to cheat and defraud the creditors of said firm, made a fraudulent and pretended sale of said goods to his father and co-appellee, William Swartzell, ostensibly in payment of a pretended debt of one thousand one hundred and some dollars, which he falsely pretended to owe his father, and for some three hundred dollars, for which he took his father's notes. It was averred that Adam G. W. Swartzell, aside from the goods so pretendedly sold, was insolvent and unable to pay his debts, which amounted to between \$2,000 and \$3,000 ; that William Swartzell, at the time he pretended to purchase the goods, knew that his son was insolvent, and that he had agreed with his partner, Voreis, to pay the debts of said firm ; that he also knew the fraudulent purposes of his son, and made the pretended purchase with the view of aiding him in his fraud. The prayer was for judgment, etc. An affidavit and bond for an attachment were filed with the complaint. The goods were attached as the property of Adam G. W. Swartzell, and afterwards sold by the sheriff, and the proceeds brought into court.

The other appellants commenced suits under the proceedings of Miller, Green and Joyce, filing complaints, affidavits and bonds.

The Swartzells answered the several complaints, upon which issues were formed. Voreis answered, admitting the claims of the several appellants, and that they were severally entitled to judgment. Adam G. W. Swartzell also admitted the several demands of the appellants, but denied that the sale made by him of the goods was fraudulent.

The venue was changed to the Porter Circuit Court, and subsequently to the Marshall Circuit Court.

Voreis filed a cross complaint, in which he alleged his partnership with Adam G. W. Swartzell, the extent of their stock of goods and its value, the indebtedness of the firm, the sale of his interest in the firm assets to said Swartzell, and his agreement to pay all the partnership debts. The insolvency

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of Adam G. W. Swartzell is alleged, and it is charged that the sale made by him to his father, who knew the terms of the dissolution of the co-partnership and the indebtedness and insolvency of Adam, is alleged to have been fraudulent, and made for the purpose of defrauding him and the creditors of said firm. It is also stated that the goods had been taken in attachment.

The prayer of the cross complaint is that the goods may be declared to be trust property and subject, in the hands of William Swartzell, to a trust in favor of the creditors of Swartzell and Voreis. Issue was taken upon the cross complaint. The cause was submitted to a jury, who returned the following verdict:

“ We, the jury, find for the plaintiff on the complaint, and there is due from the defendants Swartzell and Voreis, severally, as follows:

Miller, Green and Joyce,	\$1,159.20
English, Miller & Co.,	507.55
B. Trentman & Son,	553.39
Jacob Neidlinger & Co.,	506.58
J. H. McCauley & Co.,	28.90

And we assess the damages of the several plaintiffs at the said several sums so due each respectively, and we find for the plaintiff on the question of fraud, against the defendants Adam G. W. Swartzell and George Voreis, and for William Swartzell on the question of fraud, and, on the cross complaint of Voreis, we find for Voreis. G. W. MAXLEY, Foreman.”

The plaintiffs below moved the court for judgment, on the finding of the jury, against all the defendants, as prayed for in the complaint, and against William and George Swartzell as prayed for in the cross bill of George W. Voreis, and for an order distributing among the plaintiffs the proceeds of the attached property.

On the 26th day of September, 1875, George W. Voreis filed a motion for judgment in his favor, and for distribution of the proceeds of the attached property among the plain-

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tiffs, as creditors of the firm of Swartzell and Voreis, *pro rata*, in accordance with prayer of his cross complaint.

The court overruled these motions so far as they prayed for an order of distribution, and as to the rendition of judgment the court took the motions under advisement until the next term. At the next term, as the record states, time was given to file a motion for a new trial. On the second day of the term, the plaintiffs below and George W. Voreis filed a motion for a new trial. On the twentieth day of said term the court overruled the said motions for a new trial. The plaintiffs below, Trentman & Co. and Neidlinger & Co., and the defendant Voreis, prayed an appeal to this court.

William Swartzell moved the court to order the proceeds of the sale of said goods to be paid to him. The appellants also asked that the proceeds of the sale of the goods be retained in court and the proceedings stayed, etc. This motion was overruled. The court ordered the proceeds to be paid to William Swartzell, upon his giving bond, etc. Judgments were rendered in favor of the several plaintiffs for the sums found due them respectively, against Adam G. W. Swartzell and George W. Voreis, and against them and in favor of William Swartzell for costs. Ninety days were given to file a bill of exceptions. The bill of exceptions was not filed within the time, but the time was extended, by agreement of parties, for several terms. At the expiration of the extension of time last agreed upon, the court, over the objection of the appellees, gave further time to file the bill of exceptions. The bill of exceptions, which does not contain the evidence, was finally signed by Judge Keith, who had recently come upon the bench, and filed within the time allowed by him, over the objections of the appellees.

The ninth error assigned is that the court erred in overruling the motions for a new trial. The preceding assignments, except the eighth, which relate to the giving and refusing to give certain instructions, are not proper, but are included in the ninth. *Harding v. Whitney*, 40 Ind. 379.

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The tenth assignment is that the court erred in directing the payment of the proceeds of the attached property to William Swartzell upon his giving bond.

11. In rendering judgment in favor of William Swartzell and against the plaintiffs and against Voreis.

12. In failing to submit to the jury questions, under the complaint and answers, against garnishee defendants.

The eighth assignment questions the action of the court upon the appellants' motion for judgment and distribution of the proceeds of the sale of the attached property.

The court did not err in overruling the motion of the plaintiffs below for judgment against all the defendants below. The jury found in favor of William Swartzell that he was guilty of no fraud. Upon such a finding the plaintiffs below, appellants here, were not entitled to judgment against him, and, for the same reason, he was entitled to judgment against them, and also, as against them, to the proceeds of the attached property. Nor, if we treat the motion as separately made by the appellant Voreis, did the court err in overruling it. By the sale of Voreis' interest in the partnership effects to Adam G. W. Swartzell, they became his individual property, and he could sell and dispose of them as he pleased and apply the proceeds to the payment of his individual debts, the same as if they had never been partnership property. The lien which Voreis had upon the firm property as partner ceased as soon as he sold his interest to Swartzell. Partnership creditors have no lien upon partnership property. Their right to priority of payment out of the firm assets over the individual creditors of the partners is always worked out through the liens of the partners. Voreis having sold his interest to Swartzell, and thereby parted with his lien on the partnership assets, the partnership creditors could not afterwards assert a lien upon the goods of the late firm. *In Re Langmead's Trusts*, 7 D. M. & G. 353; *Andrews v. Mann*, 31 Miss. 322; *Lindley Part.* (Eng. ed., 1860) 578-580. It follows that William Swartzell had a right to pur-

Trentman *et al.* v. Swartzell *et al.*

chase, in good faith, from Adam G. W. Swartzell, the attached goods. The jury having found in favor of William Swartzell on the question of fraud, there was no error in overruling the motion of Voreis for judgment against him. It is true, that there is some seeming conflict in the findings of the jury, but there was no motion for a *venire de novo* or objection to the verdict on this account. Nor was there any error in rendering judgment in favor of William Swartzell, and ordering the proceeds of the attached property to be paid to him, especially upon the condition that he give bond for their repayment into court in case the judgment below should be reversed.

This disposes of all the errors assigned except the ninth.

The appellee contends that there is no motion for a new trial properly in the record.

No such motion was made at the term at which the verdict was returned; but on the first day of the next term the time for filing such motion was extended by the court, and on the second day of the term the motion was filed. No objection to the action of the court or to the filing of the motion was made by the appellees. In the absence of any objection, they will be presumed to have consented to the filing of the motion at the time it was filed. *Northcutt v. Buckles*, 60 Ind. 577; *Wilson v. Vance*, 55 Ind. 394. We think the motion may be regarded as properly in the record.

But the motion can not avail the appellants. There is no bill of exceptions in the record. Ninety days were given at the trial term to the appellant to file a bill of exceptions. It was not filed within the time given. The time was extended by agreement for several terms. At the expiration of the last agreed extension of time, the judge of the court, over the objections of the appellees, again extended the time for filing the bill of exceptions, and before the expiration of the time so given it was filed. The court had no power thus to enlarge the time for filing the bill of exceptions, nor can the exceptions filed within the time thus given be regarded as part of the record. *Greenup v. Crooks*, 50 Ind. 410; *Rhyan v. Dunnigan*,

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76 Ind. 178. This being so, neither the instructions given by the court to the jury, nor those refused, nor the action of the court upon the interrogatories asked to be submitted to the jury, are before us. They are found only in the bill of exceptions.

If the facts stated in the appellants' brief existed, they had abundant reason to feel that gross injustice had been done them; but these things do not appear of record. We must take the record as the truth, and, so regarding it, we think there is no available error in it.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

No. 9316.

FARRAR v. CLARK ET AL.

QUIETING TITLE.—*Tax Title.*—*Evidence.*—In an action to quiet the title to real estate, where the defendant claims title to the land under a tax deed, he must show by his evidence that the statute had been strictly complied with in every step required to be taken, to authorize the sale for taxes and the execution of the tax deed.

SAME.—*Constitutional Law.*—*Statute Construed.*—*Statute of Limitations.*—Section 250 of the act of December 21st, 1872, to provide for a uniform assessment of property and for the collection and return of taxes thereon, is not repugnant to any provision either of the State or Federal Constitution, and is a constitutional and valid enactment; but it must be strictly construed, and can not be held applicable to an equitable suit to quiet the title to real estate.

From the Miami Circuit Court.

J. Farrar, for appellant.

W. E. Mowbray, for appellees.

HOWK, J.—This suit was commenced by the appellees Elisha, Enoch and Isaac Clark, Mary Scott, Sarah Butler and

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Ilenas A. Kerr, against their co-appellee Elmer E. Kerr, to obtain the partition of certain described real estate, in Miami county. It was alleged in the complaint, that the appellant, Josiah Farrar, also pretended to own said real estate, or some interest therein, whereby a cloud was cast upon the title of the plaintiffs and the defendant Elmer E. Kerr. The prayer of the complaint was for partition of the real estate between the plaintiffs and Elmer E. Kerr, according to their respective interests therein, and that the pretended title of the appellant, Josiah Farrar, be adjudged null and void, and that he be prohibited from asserting any title to such real estate. The only controversy in this case, as well in this court as in the circuit court, was between the appellant, Farrar, on one side, and on the other side all the other parties to the action.

The cause was put at issue and tried by the court, and a finding was made that the appellees were the owners in fee, as tenants in common, of the real estate described in the complaint, specifying their respective interests therein, and that the plaintiffs were entitled to partition thereof as prayed for; that the appellant, Josiah Farrar, was not the owner of such real estate, as alleged in his cross complaint, and was not entitled to have title thereto quieted in him, under the tax deed thereof set out in his cross complaint; that the tax sale, under which he claimed title, was not perfected until the execution of the tax deed by the auditor of the county, on the 20th day of February, 1875, within five years of the commencement of this suit; that the plaintiffs were not barred by the limitation contained in section 250 of an act to provide for a uniform assessment of property, and for the collection and return of taxes thereon, approved December 21st, 1872, from maintaining this action; that the appellant, Farrar, was entitled to the sum of \$586.69, the amount paid out by him for taxes upon such real estate, and the lawful penalty and the interest thereon, for which amount he was entitled to a lien upon such real estate.

Over the appellant's motion for a new trial, and his excep-

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tion saved, the court rendered judgment upon and in accordance with its finding.

In this court the only error assigned by the appellant is the overruling of his motion for a new trial; and, in this motion, the only causes assigned for such new trial were, that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law.

The appellant claimed title to the real estate in controversy, under an invalid tax sale and an invalid tax deed. No attempt was made to show that the necessary steps had been taken by the proper officers to secure a valid and legal sale and conveyance of the real estate for the non-payment of taxes. Such a showing would have been indispensable, if the appellant had relied upon the validity of his title, under his tax deed; and, in such case, the burden of making such showing would have been on him. In other words, if the appellant had claimed title under and by virtue of his tax deed alone, it would have devolved on him to show affirmatively that the law had been strictly complied with in every step required to be taken to authorize the sale for taxes, and in the making of such sale. *Ellis v. Kenyon*, 25 Ind. 134; *Steeple v. Downing*, 60 Ind. 478; *Smith v. Kyler*, 74 Ind. 575.

But we do not understand that the appellant claimed title to the real estate in controversy under and by force of his tax deed alone. Indeed, the reverse is shown by the testimony of the appellant, an attorney of much experience and learning, who expressly declared, in response to the questions of the court, that he did not claim that his tax deeds and other evidence, of themselves, conveyed the title to him. He virtually admitted that if this suit had been commenced within five years from the date of the tax sale, his title under his tax deed would have constituted no valid or sufficient defence to appellees' suit against him, and would not have entitled him to a judgment or decree quieting his title as against the appellees, as prayed for in his cross complaint. To aid his defence to appellees' suit, and to support his cross action against

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the appellees, he relied below and relies here upon the provisions of section 250 of the act of December 21st, 1872, to provide for a uniform assessment of property, and for the collection and return of taxes thereon. This section reads as follows:

“Sec. 250. No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the date of the sale thereof for taxes as aforesaid (anything in the statutes of limitation to the contrary notwithstanding): *Provided*, That where the owner of such real property, sold as aforesaid, shall, at the time of such sale, be a minor, insane, or under other legal disabilities, five years after such disability is removed, shall be allowed such person or persons, their heirs or legal representatives, to bring their suit or action for the recovery of the real property so sold.” 1 R. S. 1876, p. 127.

The appellees' counsel has vigorously attacked this section of the statute, upon the ground that its provisions are not the subject expressed in the title of the act, nor “matters properly connected therewith;” and, therefore, counsel claims that the section is repugnant to section 19, of article 4, of the Constitution of this State, and absolutely void. We do not think that the section quoted is open to this objection. The subject of the act is taxation; and the uniform assessment of property for taxation, and the collection and return of the taxes thereon are matters properly connected with such subject. It was not necessary that the title of the act should go further and contain an expression or even an indication of the various provisions of the statute for the enforced collection of taxes by the sale of property, or of the inducements to purchasers at such sales; or of the loss of property which the tax-payer might sustain by the non-payment of his taxes. All the incidents of the collection of taxes are matters properly connected with the subject of the act in question, as expressed in its title. We are of the opinion, therefore, that the provisions of section 250, above quoted, are matters properly con-

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nected with the subject of the act of December 21st, 1872, as expressed in its title, and are not repugnant to any provision of the Constitution of this State. *McCaslin v. State, ex rel.*, 44 Ind. 151; *Shipley v. City of Terre Haute*, 74 Ind. 297; *Kane v. State, ex rel.*, 78 Ind. 103. Nor can it be said, we think, that the section under consideration is repugnant to that provision of section 1, of article 14, of the Federal Constitution, which provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The section is a constitutional and valid enactment.

But we are of opinion that the section is not applicable to the case at bar. This is not an action to recover the real estate in controversy, or any interest therein. As between the appellees and appellant, the action is simply to quiet the title to the real estate, by removing a cloud from such title, and for no other purpose. In section 211 of the civil code of 1852, it was provided that an ordinary action "for the recovery of the possession of real estate" must be commenced within twenty years after the cause of action has accrued, and not afterwards. But a suit to quiet the title to real estate is widely different from a suit for its recovery. The former might be brought, under section 611 of the civil code of 1852, by a party either in or out of possession, or by a remainderman or reversioner; while the latter could only be maintained, under section 592 of the same code, by a party out of possession, "having a valid subsisting interest in real property, and a right to possession thereof." The former was strictly an equitable suit, and, before the adoption of the code, could only have been prosecuted by bill in chancery, in a court of equitable jurisdiction, while the latter was a common law action. The limitation prescribed by the code for an action to recover the possession of real property was not applicable in terms to an action to quiet the title to real estate; nor did the code prescribe in terms any period of time within which the latter action should be commenced. For this reason, it has been held by this court, that actions to

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quiet the title to real property were limited only by section 212 of the civil code of 1852, which provided that "All actions not limited by any other statute shall be brought within fifteen years." *Caress v. Foster*, 62 Ind. 145; *Brown v. Foder*, 81 Ind. 491.

Section 250 of the tax law, above quoted, upon which the appellant relies in this action, was not applicable by its terms to an action to quiet the title to real estate. The section, we think, should be construed strictly. We can not extend the provisions of the section, by construction, beyond what was expressed in and by the exact letter of the statute. The section quoted, by its terms, did not cover the case before us, and was wholly inapplicable thereto. In the absence of this section of the statute, it is very clear, as it seems to us, that the appellant had no valid or legal defence to appellees' complaint against him; and, certainly, he had no such cause of action against them as is stated in his cross complaint. The section of the statute afforded him no assistance and did not strengthen him, either in his defence or in his cross action. He had nothing to rely upon, except only his tax deed, and that, as we have seen, was not shown to be sufficient to confer on him the title to the real estate.

Upon the whole case, we are of the opinion that the court committed no error in overruling the appellant's motion for a new trial. This conclusion renders it unnecessary for us to consider or decide any of the questions arising under the appellees' cross errors.

The judgment is affirmed, with costs.

 No. 8275.

LOVELY ET AL. v. SPEISSHOFFER.

SHERIFF'S SALE.—*Return*.—A proper sale of lands by a sheriff, by virtue of a proper decree issued to him authorizing it, and a sufficient deed

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made by him at the proper time, there having been no redemption, vest a good title in a stranger who purchases, as against the defendants in the decree, though the sheriff, by mistake, fails to endorse a return on the decree in his hands.

SAME.—*Collateral Attack.*—*Ejectment.*—In ejectment by the purchaser at sheriff's sale, against the defendant in the execution, the latter can not attack the sale save for causes which render it, not voidable merely, but absolutely void.

EJECTMENT.—*Complaint.*—*Title.*—A complaint for the possession of lands, which, by the facts averred, shows title in the plaintiff, without stating the conclusion that he is owner, is good on demurrer.

PLEADING.—*Prayer for Relief.*—A complaint, alleging facts which entitle the plaintiff to some relief, is good on demurrer, and is not vitiated by a prayer for the wrong relief.

NEW TRIAL.—*Causes.*—"Error of law occurring at the trial as hereafter set forth, and excepted to by the defendant," is not sufficiently specific, as a cause for a new trial, to present any question.

From the Marshall Circuit Court.

J. S. Frazer and W. B. Hess, for appellants.

M. A. O. Packard and O. M. Packard, for appellee.

ELLIOTT, J.—The second paragraph of the appellee's complaint alleges that one Samuel Miller obtained two decrees of foreclosure against Noble D. Lovely, then in life, and Angeline Lovely, his wife; that these decrees ordered the sale of certain parcels of real estate, and, among them, the one here in controversy; that the sheriff duly advertised and sold the property, according to law, and the appellee became the purchaser; that it was not redeemed, and, at the expiration of one year from the day of sale, he received a deed from the sheriff. It is also alleged that the sheriff sold the property on the proper decree, but, by mistake, made his return on the wrong certificate; and that the appellants are wrongfully in possession, claiming title.

We think this paragraph is good. It shows a valid sale, and the delivery of a sufficient deed. The mistake in endorsing the return on the wrong decree did not make the sale void; in fact, the failure of the sheriff to make any return at

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all would not, of itself, have invalidated the sale. *State, ex rel., v. Salyers*, 19 Ind. 432.

It is said that the pleading is bad because it does not allege ownership. This objection is not well founded. The facts are stated which show the appellee's title, and this is sufficient, without stating the mere general conclusion which results from the application of the law to these facts.

It is also said that the complaint prays that the sheriff may be compelled to correct the mistake in his return, and that, as courts have no authority to compel the sheriff to do this, the pleading is bad. We need not enquire whether the appellants are right in their statement of the rule as to the power of the court over the sheriff, for it is plain that if they were correct the conclusion deduced would not follow. If it were conceded that so much of the pleading as seeks an order against the sheriff was bad, it would still repel a demurrer, for the facts show the plaintiff entitled to some relief, and, where this is so, a demurrer will not lie. *Bayless v. Glenn*, 72 Ind. 5; *Teal v. Spangler*, 72 Ind. 390.

The first and third reasons stated in the motion for a new trial are the usual ones, that the finding is contrary to the law and the evidence. The second is thus assigned: "*Second.* For error of law occurring at the trial of said cause as hereafter set forth, and excepted to by the defendants." This is not sufficient to present any question, and we are therefore only required to consider such as are presented under the first and third reasons.

The evidence shows the decree of a court of competent jurisdiction; the issue and delivery of a certified copy thereof to the sheriff; advertisement and sale; payment of the purchase-money, and the execution of a certificate and deed. This was abundantly sufficient to show title in the appellee.

The general rule is that a third person who purchases at a sheriff's sale is not affected by irregularities in the proceedings of the sheriff. There is certainly no such irregularity here shown as would justify the court in declaring the sale

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void. The error of the sheriff in endorsing the return on the wrong decree could not have possibly harmed any one, for the certificate and the deed showed what property was sold. Indeed, as we have already seen, if the sheriff had made no return at all the sale would have been valid.

It is contended that the sheriff did not sell the property in the order directed by the decree. We are inclined to think that the construction placed upon the decree by the sheriff is correct, and that the sale was made in strict accordance with its provisions. At all events, it is quite clear that there was no such departure as worked injury to the parties, and, where this is so, the title of such a purchaser as the appellee should be sustained.

It is now settled that an execution defendant can not successfully defend an action brought to recover possession of land purchased at a sale made by the sheriff, without showing that the sale was void. A sale that is merely voidable can not be collaterally attacked. *Jones v. Kokomo, etc., Co.*, 77 Ind. 340.

The appellants utterly failed to show any irregularity or misconduct which would render the sale void, and the court below did right in rendering judgment against them.

Judgment affirmed.

No. 9487.

HAMDON v. STON ET AL.

85	457
141	331

REAL ESTATE, ACTION TO RECOVER.—*Complaint.*—*Description.*—A tract of land situate, etc., known as a part of the J. W. farm, in fractional section, etc., containing, etc., is not a sufficient description; and a complaint to recover real estate by such description may be dismissed.

SAME.—*Discretion of Court.*—If, in a complaint to recover real estate, the description of the land be valid, but uncertain or obscure, the court may require that it be made more specific.

From the Floyd Circuit Court.

Hammond v. Stoy *et al.*

J. H. Stotsenburg, for appellant.

D. C. Anthony, for appellees.

WOODS, C. J.—Complaint in two paragraphs by the appellant to recover of the appellees the possession of real estate. The court, upon motion of the appellees, directed the appellant to make the first paragraph more specific in respect to the description of the land sought to be recovered, and, the appellant having refused to do so, dismissed the action as to that paragraph. The question for decision is, whether or not this action of the court was erroneous.

The description of the premises given in the paragraph is as follows:

“A tract of land in the county of Floyd, and State of Indiana, known and described as a tract of land in said county on the bank of the Ohio river, known as a part of the Joshua Wilson farm, and in fractional section fifteen (15), township,” etc., “containing forty acres.”

Counsel for the appellant insists that the phrase “part of the Joshua Wilson farm,” is the known and established name and description of the forty acres of land sought to be recovered, and as such is as good as “Manor of Dale,” “White-acre” or the like descriptions, whose sufficiency can not be questioned.

If this proposition were conceded, it would not necessarily follow that the court exceeded its proper discretion in requiring a more particular and definite description to be brought into the record. That which would be sufficiently definite in evidence may often be entirely insufficient in pleading, where certainty of averment, at least to a common intent, is always required. *Halstead v. Board, etc., infra*; *Lemmon v. Whitman*, 75 Ind. 318 (39 Am. R. 151).

We are, however, of the clear opinion that the phrase referred to, as used in the pleading, has no such significance as is contended for, but must be interpreted according to the plain meaning of the words used. Under the rule that that

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is certain which can be made certain, it might be a sufficient description to write, "The Wilson farm, in section No.," etc.; but to say a "part of" such farm, without defining the part, is clearly bad for uncertainty, and the uncertainty is not removed by the averment of quantity.

In *Whittelsey v. Beall*, 5 Blackf. 143, a bill for the foreclosure of a mortgage was held to be "defective in not so describing the land, that the officer of the court may know on what premises to enter to execute the order of the court," and to the same effect are the later cases. *Magee v. Sanderson*, 10 Ind. 261; *Nolte v. Libbert*, 34 Ind. 163; *Bowen v. Wood*, 35 Ind. 268; *White v. Hyatt*, 40 Ind. 385; *Struble v. Neighbert*, 41 Ind. 344; *Gigos v. Cochran*, 54 Ind. 593; *Halstead v. Board, etc.*, 56 Ind. 363; *Lewis v. Owen*, 64 Ind. 446; *Kercheval v. Lamar*, 68 Ind. 442; *Bayless v. Glenn*, 72 Ind. 5; *Rucker v. Steelman*, 73 Ind. 396; *Allen v. Shannon*, 74 Ind. 164.

Judgment affirmed.

No. 10,465.

BLANKENBAKER ET AL. v. BANK OF COMMERCE ET AL.

DECEDENTS' ESTATES.—*Preferred Claims.*—*Attorney's Lien.*—*Res Adjudicata.*—*Judgment.*—*Collateral Attack.*—*Trustee.*—*Case Distinguished.*—A suit was pending against B., when she died, to recover attorneys' fees for services in a cause wherein B. had recovered a judgment for \$25,000. Her administrator having then been made a party, such proceedings were had that the sum of \$5,000 was allowed to the attorneys, and a decree entered establishing a lien therefor upon the judgment. The attorneys afterwards, by petition, applied for an order upon the administrator to compel him to pay their allowance out of the proceeds of the judgment as a preferred claim, and the other creditors of the estate were made defendants to the petition.

Held, that the order prayed was properly granted.

Held, also, that the original decree establishing the lien, being unreversed,

85	459
127	188
85	459
147	140

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was an adjudication which bound all creditors of the estate, though not parties thereto, the administrator being their proper representative and, as to them, the trustee of an express trust, and, however erroneous, such creditors could not question it collaterally. *Jenkins v. Jenkins*, 63 Ind. 120, distinguished.

From the Floyd Circuit Court.

E. Field and *L. Stout*, for appellants.

C. F. McNutt, *W. A. Montgomery*, *G. W. Grubbs* and *D. C. Anthony*, for appellees.

NIBLACK, J.—This was a proceeding upon petition by the Bank of Commerce, of Indianapolis, Cyrus F. McNutt, William A. Montgomery and George W. Grubbs, against Leonidas Stout, as administrator of the estate of Eliza Bowles, deceased, and against Hiram D. Blankenbaker, Burnie Gaw, John C. Albert, Samuel Ryan, John W. Tucker and Arthur J. Simpson, as creditors of said estate, to obtain an order requiring Stout, as such administrator, to pay an allowance, in the nature of a decree, standing in their favor, against the estate, as a preferred claim.

The cause was tried upon an agreed statement of facts under the provisions of section 553 of the code of 1881.

The facts agreed upon were to the effect that, on the 7th day of December, 1868, the said Eliza Bowles, being then in life, by the consideration of the Orange Circuit Court, obtained a decree of divorce from her husband, William A. Bowles, and a judgment for \$25,000 for alimony; that Samuel H. Buskirk, Cyrus F. McNutt, William A. Montgomery and George W. Grubbs were her attorneys in obtaining the decree of divorce and judgment for alimony; and that the services rendered by them in that behalf were reasonably worth the sum of \$5,000, no part of which had ever been paid; that no lien was taken by said attorneys, or either of them, to secure their fee under the statute of 1865, upon the subject of liens for attorneys' fees; that afterwards, and before the death of the said Eliza Bowles, said attorneys commenced a suit in

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attachment against her, in the said Orange Circuit Court, to recover their said fee ; that afterwards, on the 8th day of February, 1870, and before said suit was tried, the said Eliza Bowles died intestate, and the said Leonidas Stout was, on the 7th day of March, 1870, by the proper court of Floyd county, appointed administrator of her estate ; that thereupon the said attorneys filed in the said Orange Circuit Court an amended complaint, making the said Stout, as such administrator, sole defendant in said action ; that after the amended complaint was so filed the cause was, on a change of venue, transferred to the county of Floyd, and afterwards, in like manner, to the county of Harrison ; that, on the 27th day of March, 1872, said cause was tried in the Harrison Circuit Court, and a judgment rendered therein as follows :

“ Come now the parties and the defendant files his answer to the plaintiffs’ complaint, and, the cause being now at issue, the same was submitted to the court for trial, without a jury, upon complaint, answer, exhibits and evidence in the cause and agreement of the parties in open court made. And the court, being sufficiently advised, finds for the plaintiffs, and that the allegations of the complaint are true, and that the reasonable value of the services of plaintiffs in procuring the divorce and alimony for defendants’ decedent, as set forth in plaintiffs’ complaint is \$5,000, and that the assets of the estate of said defendant [decedent] consist chiefly of the judgment for alimony in complaint mentioned against William A. Bowles, and of money and property in Floyd county, Indiana.

“ And the court further finds that said services of plaintiffs for said decedent were useful and beneficial to her, and that it was mutually agreed and understood between plaintiffs and said decedent that said judgment and recovery for alimony should be and constitute a fund to which plaintiffs should look, and out of which they should receive their fees and expenditures in her behalf, by reason whereof the court finds

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that there is an equitable lien in favor of plaintiffs upon said judgment and decree for alimony for said fees and expenses in the hands of said defendant to be administered.

“ It is, therefore, ordered, adjudged and decreed that the plaintiffs have and recover of said defendant the said sum of \$5,000, to be collected and made from the proceeds of said judgment and decree for alimony, and by agreement in open court it is ordered that each party pay the costs by them made.”

It was further agreed that the persons named as creditors of the estate, in the petition filed in this cause, are general creditors, a claim having been filed by, and allowed in favor of, each of such persons against the estate ; also, that the interest of Samuel H. Buskirk in the judgment rendered as above in the Harrison Circuit Court had been assigned to the Bank of Commerce of Indianapolis.

Upon this agreed statement of facts the court below made a finding, and came to the conclusion, that the petitioners were entitled to the relief demanded by them, and ordered, adjudged and decreed that the amount due to the petitioners upon the said judgment of the Harrison Circuit Court should have a preference in its payment over the claims of the general creditors of the estate ; to all of which the respondents, as defendants in the proceeding, at the time excepted.

The appellants claim that the case of *Jenkins v. Jenkins*, 63 Ind. 120, is in principle decisive of this case in their favor, but we are of the opinion that there are important points of difference between the two cases. In that case, the original order allowing the claim did not declare it to be a preferred claim, and did not in any manner give to it any preference over the general claims against the estate. In the next place, the order upon the subsequent proceedings declaring the claim to be entitled to a preference in its payment, was directly attacked by an appeal to this court. Whereas the judgment of the Harrison Circuit Court, establishing the lien asserted in this case, was not appealed from or otherwise questioned by any direct proceeding, having been permitted to remain in full force as a

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final adjudication of the matters which it purports to embrace and to adjudicate. It is regular upon its face, and rendered in a court of competent jurisdiction. However erroneous, therefore, it may have been, we can not treat it as a void judgment because of any objection now collaterally urged against it.

Hence we are unable to make any practical application of the case of *Jenkins v. Jenkins*, *supra*, to that judgment which is now before us, only as a fact of an evidentiary character, and not for review upon an appeal from the proceedings in which it was rendered.

We are, consequently, of the opinion that the agreed statement of facts, upon which the cause was submitted, established the fact that the right of the appellees to preference in payment over the general creditors was a matter already adjudicated and settled by the judgment of the Harrison Circuit Court, and that the court below did not err in the conclusion at which it arrived upon the facts before it.

A question is suggested as to the propriety of making the general creditors parties to this proceeding, but as no such question was raised in the court below the record presents nothing on that subject for our decision.

As incident, however, to the subject of costs upon this appeal, we may remark that those creditors were not necessary parties.

In all matters pertaining to the ordinary settlement of an estate, the administrator is the proper representative of the creditors in the prosecution and defence of actions affecting their interests in the estate, and is as to them the trustee of an express trust. R. S. 1881, section 252; *Vogel v. Vogler*, 78 Ind. 353.

The judgment is affirmed, with costs.

HOWK, J., was absent when this cause was considered.

Colgate, Receiver, v. Roberts *et al.*

No. 10,026.

COLGATE, RECEIVER, v. ROBERTS ET AL.

BOND.—Condition.—Breach.—Pleading.—In a suit on a bond with several conditions, there can be a recovery only for the breaches assigned by the complaint.

SAME.—Receiver.—To a complaint on a receiver's bond, assigning for breach a failure to pay over to his successor \$1,000, money received by the obligor as receiver, an answer showing a credit of \$857 allowed him on settlement by the court which appointed him, and that said court found a balance due from him of \$94, which he paid to his successor, is good on demurrer.

From the Jefferson Circuit Court.

M. D. Wilson and *W. H. Cord*, for appellant.

E. R. Wilson, *W. T. Friedley* and *C. E. Walker*, for appellees.

BICKNELL, C. C.—Walter S. Roberts, as receiver of the German Building and Loan Association No. 2, of Jefferson county, Indiana, gave bond, with Charles E. Walker as surety, in the penalty of \$1,000, conditioned for the faithful performance of duty and for the proper payment of all moneys by him received as such officer.

Harry Colgate, his successor in office, brought this suit on said bond, against principal and surety, alleging that Roberts, on demand, had failed to pay over to his said successor \$1,000, moneys received by said Roberts as such officer. The suit was commenced on January 10th, 1882.

The defendant Roberts answered in two paragraphs:

1st. A general denial.

2d. An accounting and payment in full before suit brought, and a discharge by the proper court.

To the second paragraph of this answer the plaintiff replied in three paragraphs:

1st. In denial of such accounting and payment.

2d. In denial of the discharge, and averring that, besides the amount accounted for, there is an unpaid judgment against

Colgate, Receiver, v. Roberts *et al.*

the defendant in favor of plaintiff for \$1,307.15, with interest from March 1st, 1880.

3d. Substantially the same as the second.

The defendant Walker answered in five paragraphs:

1st. That he was surety in the bond; that at the February term, 1879, of the Jefferson Circuit Court, Roberts fully accounted for and paid into court all that was found due from him as receiver, to wit, \$94, and was then fully discharged by said court.

2d. That Roberts paid to the creditors of said building association, under the orders of said court, all the moneys he ever had as such receiver.

3d. As to all but \$143, that Roberts owed the association \$2,500 for money borrowed by him from it, and secured by a second mortgage on property of his, subject to a prior mortgage to Helen Carmany for \$1,000; that one Umbach held the note of the association for \$1,000, and one Bierck held the note of the association for \$100, credited with \$43; that this defendant bought said Umbach's note for \$800, and said Bierck's note for \$57; that afterwards said Roberts fraudulently entered of record a satisfaction of his mortgage, without any payment made thereon, and then mortgaged the same property to said Umbach for \$700; there being yet really due on his own mortgage to the association about \$1,300; that Roberts afterwards, when he settled with the court in 1879, reported his said mortgage as part of the assets of the association, and fully settled and paid over the amount found due by him as such receiver, counting said mortgage as part of the assets; that afterwards said Umbach mortgage was decreed by said court to be a superior lien to the mortgage of said Roberts wrongfully entered satisfied by him as aforesaid, and said satisfaction was adjudged to be null and void, and it was decreed that there was due said association thereon from said Roberts \$1,307, and the property was ordered sold to satisfy all of said mortgages, and was amply sufficient to pay them all, but

Colgate, Receiver, v. Roberts et al.

said Colgate failed to attend the sale, and made no effort to procure bidders, and permitted the property to sell for barely enough to pay the Carmany and Umbach mortgages; that in March, 1880, Roberts had been cited to appear and make settlement, and in order to obtain from this defendant, for use in such settlement, the notes of said association, so purchased as aforesaid by this defendant, which together amounted to \$1,057 and interest, he agreed to give this defendant therefor \$857, the amount paid therefor by defendant, and to secure the same by his note with E. P. Meyer as surety, and upon that agreement this defendant let him take the notes to be used in said settlement, he promising to get said Meyer to sign said note, as soon as he could see him; that on said settlement said Roberts was allowed for said notes \$857, being the amount this defendant had paid therefor, without interest, and after that allowance said Roberts was found indebted as such receiver to his successor, \$94, which he paid; that by the transaction aforesaid this defendant in effect paid for said Roberts said sum of \$857; that said Meyer has never signed said note, and said Roberts is insolvent, and that this defendant, having thus paid to the association \$857, is liable upon the bond only for \$143, which, with said \$857, will make up the entire penalty of the bond.

4th. Payment in full by defendant.

5th. A set-off of \$1,000 for money had and received, and money paid by defendant for the use of the association.

The plaintiff replied to the answer of said defendant Walker as follows:

To the first paragraph, that said Roberts did not fully account and was not discharged by the court; and that said notes of Umbach and Bierck were taken in said settlement by said association from Roberts as the rightful owner thereof, and without notice of any claim upon them by the defendant Walker.

To the second paragraph, a denial.

To the fourth paragraph, a denial.

Colgate, Receiver, v. Roberts *et al.*

As to the fifth paragraph, the plaintiff moved to make it more specific, but there was no action of the court thereon, and there was no reply to said fifth paragraph, which must be regarded as denied.

To the third paragraph of Walker's answer, the plaintiff filed a demurrer, which was overruled.

The defendant Walker filed a demurrer to the plaintiff's reply to the first paragraph of his answer, and a motion to strike out a part of the plaintiff's reply to the fourth paragraph of his answer, but there was no action by the court on either of these matters. The record then states as follows:

"Come the parties, and the plaintiff abides by his demurrer to the third paragraph of the defendant Walker's answer, and refuses to reply thereto, and by agreement this cause is submitted to the court for trial upon the other issues, and the court, by like agreement, finds for the plaintiff, as damages on said official bond sued on, \$143."

Upon this finding a judgment was rendered, from which the plaintiff appealed, assigning as errors:

1st. Overruling the demurrer to the third paragraph of the answer of the defendant Walker.

2d. Not giving judgment for the amount claimed in the petition.

3d. Not rendering judgment for the amount of the covenant or penalty sued on.

The second and third of these specifications are too general to raise any question. *Ray v. Detchon*, 79 Ind. 56; *Durham v. Craig*, 79 Ind. 117. There was no motion to modify the judgment.

As to the first error assigned, the bond sued on contains in its condition two specifications, first, that Roberts shall faithfully perform his duty as receiver; second, that he shall pay over to the proper persons all moneys received by him as such officer.

The only breach assigned in the complaint is a breach of the second specification in the condition. The complaint states

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a judgment "awarding the whole of said goods and chattels remaining in the hands of the former receiver, Walter S. Roberts, to the said plaintiff and receiver herein, Harry Colgate;" and the complaint proceeds thus: "But said former receiver herein, Walter Roberts, as aforesaid, being short in his accounts as receiver more than \$1,000, did not obey said order of said court in the payment of all said money so received and collected by him to the plaintiff, but of said moneys * * * more than \$1,000 now remains long past due and unpaid, though said plaintiff has duly demanded the same," etc. Wherefore plaintiff demands judgment for the sum of \$1,000, and all proper relief.

If Roberts, being receiver of the association, was personally indebted thereto for borrowed money, secured by a mortgage of his property, and if, as receiver, he fraudulently entered upon the record a satisfaction of that mortgage, without paying any part of it, and then mortgaged the property to an innocent third person, so that his mortgage became a superior lien to the mortgage of the association, and the security of the association for the debt of Roberts was thereby impaired or lost, this would be a breach of the first specification in the condition of the bond; it would not be a faithful performance of duty, but it would not show any breach of the second specification in the condition, because, in such a transaction, the receipt and retention of any money of the association by Roberts, as receiver, are neither expressed nor implied.

He would have injured the association by his action as receiver, in wrongfully entering satisfaction of his own mortgage on which nothing had been paid; he would be liable for that breach of duty in a proper action on the bond, but the present action is not for that breach; the complaint claims merely that Roberts had money of the association in his hands as receiver which he refused to pay over.

To such a claim any defence is valid which shows that the defendant had no money in his hands as receiver, or that he paid over all that he had.

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The third paragraph of Walker's answer avers, that Roberts made a settlement of his receivership with the proper court, and was allowed \$857 for certain notes made by the association which had come into his hands, and that after such allowance he was found indebted as such receiver, to his successor, in the sum of only \$94, which he paid.

These facts are admitted by the demurrer; they show that there is no cause of action for the only breach of the bond alleged in the complaint, and that there was no money in the hands of Roberts as receiver which he failed to pay over.

There was no error in overruling the demurrer to the third paragraph of Walker's answer. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

No. 9308.

NAUGLE ET AL. v. STATE, EX REL. MYERS ET AL.

BOND.—Justice of Peace.—Complaint not Cured by Verdict.—A complaint upon the official bond of a justice of the peace, for a failure to pay over money, must show that the justice received the money during the period of time covered by the bond; a defect in this respect not being cured by the verdict.

SAME.—Defects Cured by Statute.—A misrecital in the bond of a justice of the peace in respect to the commencement of his term of office does not affect the validity of the bond, the defect being cured by the statute. Code 1852, sec. 790; R. S. 1881, sec. 5530.

From the Monroe Circuit Court.

J. W. Buskirk and *H. C. Duncan*, for appellants.

J. H. Loudon and *R. W. Miers*, for appellees.

WOODS, C. J.—The first question presented for consideration in this case is, whether the complaint states facts suffi-

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cient, after verdict, to constitute a cause of action. The action is for alleged breaches of the bond of a justice of the peace. It is alleged that in the year 1873, Israel Naugle was elected and commissioned, and on the 30th day of December, 1873, was duly qualified as a justice of the peace and gave his bond as such, signed by his co-defendants as sureties, and conditioned according to law; that on the 25th day of December, 1876, the relator recovered a judgment before said justice of the peace for a sum named, which "was subsequently paid by the judgment defendant to the said Naugle as justice;" and that he has refused to pay over to the relator the money so collected, though demand has been often made, and that he converted the money to his own use. A copy of the bond was made a part of the complaint, and, as exhibited, purports to have been made and approved as alleged, on the 30th day of December, 1873. In the body of the bond it is recited that "Israel Naugle has been elected and commissioned a justice of the peace * * for the term of four years from the 7th day of January, A. D. 1872."

The objection made to the complaint is that it does not show a receipt of the money, nor even the rendition of the judgment upon which it was paid, within the term covered by the bond.

The Constitution provides that a justice of the peace "shall continue in office four years," and "until his successor shall have been elected and qualified." R. S. 1881, secs. 174, 225. The complaint alleges that Naugle was elected and commissioned in 1873, and took the oath and gave bond on the 30th day of December of that year; and as a failure to give bond "within ten days after the commencement of his term of office and receipt of his commission" would have operated to vacate his office (R. S. 1881, sec. 5527), it may fairly be presumed that the term for which he was elected did not commence earlier than December 21st, 1873. This being so, it follows that the recital in the bond in respect to the beginning of the term was an error, which, under the 790th section of the code of

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1852, R. S. 1881, sec. 5530, does not affect the validity of the bond. But while this shows that the relator recovered his judgment within the time covered by the bond in suit, it does not show the receipt of the money within that time, and it is clear, if the question were presented upon demurrer, that the complaint is not good. *Urmston v. State, ex rel.*, 73 Ind. 175, is directly in point. Counsel for the appellee claim that the defect is cured by the verdict, but we are of a different opinion. It is not simply an imperfect statement of a cause of action, but a failure to show a right of action against the makers of the bond in suit. It is alleged that the money was paid to Naugle as justice, but that may have been during a subsequent term of office, when, as it must be presumed, he was acting under another bond. In order to uphold this complaint we must indulge the presumption that the money was paid upon the relator's judgment within a certain time, when there is no averment to that effect, or that Naugle continued to hold his office, without re-election, or, if re-elected, without giving new bond, when nothing is alleged which even tends to show or suggest such facts.

This makes it unnecessary to consider other questions.

Judgment reversed and cause remanded, with leave to the plaintiff to amend the complaint.

85	471
120	122

No. 9847.

OPPENHEIM ET AL. v. THE PITTSBURGH, CINCINNATI AND
ST. LOUIS RAILWAY COMPANY.

CITY.—*City Court, How Established.—Tenure of Judge.*—A resolution of the common council which directs the election of a city judge according to section 3204, R. S. 1881, brings the city under that act (sections 3204–3221), and the judge so elected holds office until his successor is elected and qualified, and no further order of the council is required directing future elections.

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JUDGMENT.—*Collateral Attack.*—*Notice.*—A judgment can not be attacked collaterally for insufficient notice to a party, if it appear that there was some notice although defective.

SAME.—*Jurisdiction.*—*City Court.*—When a city court erroneously determines notice to a party to be sufficient, that determination can not be collaterally impeached.

From the Cass Circuit Court.

J. C. McGregor, for appellants.

N. O. Ross, for appellee.

ELLIOTT, J.—John C. McGregor, acting as and claiming to be the judge of the court of the city of Logansport, issued a writ of attachment at the suit of appellant Oppenheim, and in the same proceeding issued a summons against the appellee as garnishee, and on the 13th day of October, 1879, rendered judgment in appellant's favor against the appellee. This action was instituted by the latter to enjoin the enforcement of that judgment.

McGregor was elected to the office claimed by him on the 4th day of May, 1875. The resolution of the common council directing the election was passed on the 12th day of March of that year, and reads as follows: "That whereas the city of Logansport has a population of over six thousand inhabitants, it is ordered that there be elected at the election of city officers to be held on the first Tuesday in May of this year, a city judge, to hold his office for the term of four years, and until his successor shall be elected and qualified as required by section one of an act to establish courts in cities having a population of six thousand inhabitants." There was a general election of city officers in May, 1879, but no order was made or notice given for the election of a city judge at that election, nor were any votes cast for any candidate for that office.

The contention of appellee is that McGregor ceased to be an incumbent of the office in May, 1879, for the reason that the statute makes the continuance of the office dependent upon the order of the common council, and that as they had restricted the term to four years, and made no order for its

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continuance or for an election in 1879, there was no such office in existence after the expiration of the term of four years. The appellants' position is: McGregor had a legal right to hold the office until a successor was elected and qualified or the resolution of March 12th, 1875, rescinded.

The general rule is that where the law creates an office, and designates the term, the person elected to fill the office will hold until his successor is elected and qualified, unless there is some express provision to the contrary. *Elam v. State, ex rel.*, 75 Ind. 518; *Steinback v. State, ex rel.*, 38 Ind. 483; *Tuley v. State, ex rel.*, 1 Ind. 500. Where the statute makes the continuance of the office depend upon the orders of a municipal legislature, of course this rule does not apply. The first question in this case is whether the act of 1875 does make the continuance of the office depend upon orders of the common council made as each term of office expires. The first section of that act reads thus: "Be it enacted by the General Assembly of the State of Indiana, That the legal voters of any incorporated city, having a population of over six thousand inhabitants, may, at any special election, elect a city judge, if the common council, by proper order duly entered of record, shall have so directed; such judge shall have the qualifications required for judges of the circuit court, and shall have the jurisdiction and powers as in this act is provided, and shall hold his office for the term of four years, and until his successor shall be elected and qualified."

We are unable to find anything in this statute requiring that the common council shall at the expiration of every four years adopt an order for the continuance of the city court. On the contrary, it is clear that when the court is once established it is to continue unless legally abolished. The provisions made for the duties of the judge and for the means of enforcing his judgments very plainly show that the tribunal was intended to be a permanent one. The provision in the section quoted, that the person elected shall hold until his successor is elected and qualified is strong, if not controlling,

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evidence of the legislative intention to make the court, when once brought into existence, as much a permanent one as that of the mayor. There is no reason for requiring an order, establishing or continuing the court, to be made every four years, and certainly no language commanding it. We can conceive of no good purpose that would be subserved by requiring an order to continue what was at the outset properly established and in its nature continuous and enduring. It can not be reasonably supposed that the Legislature meant to require a re-creation of a tribunal which, once brought into existence, would naturally and of its own inherent strength continue in existence without the assistance of the municipal legislature.

The statute is awkwardly framed, but there is enough in it to show that the Legislature meant to make provision for the establishment of an office connected with and forming part of the governmental organization of municipal corporations of a designated class. The intention was to provide for the creation and existence of an office, not merely for the election of an officer. A court is created, and this is something more than the judge who presides in it. The court is a fixed and continuing thing, not terminating every four years unless kept in existence by an act of the municipal council. The office of judge is a distinct and different thing from the officer, and the office may endure although the officer may die or resign.

The resolution of the common council, passed under and in accordance with the statute, contemplates the establishment of a permanent office, for it provides that the person chosen to the office of judge shall hold for the term provided and until his successor shall be elected and qualified. Taking into consideration the provisions of the statute and those of the resolution, it is plain that the office of judge did not cease to exist four years after McGregor's election. The city court is a permanent department of the municipal government, and the office of its judge can not be for a period different from that of the court itself, although it may be divided into terms of four years each. It is not one term that ends the office ;

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that ends only with the termination of the court. The term of a judge may cease, but the court as a legal creation will continue. A vacancy in the office of judge does not put an end to the existence of the court.

The effect of the resolution of the common council was to bring the municipality they represented within the provisions of the statute. It does not attempt to do anything different. By ordering the election, the statute was made to apply to the city of Logansport, and the court came into existence under the provisions of that law. The authority conferred by the legislative act is to accept its provisions, not to make other or different ones; so that when the common council by ordering the election brought their municipality within the provisions of the statute, they brought into existence the court provided for by the Legislature. The common council have no authority to do more than bring the city they represent within the provisions of the act, and this they do by directing an election. When this order is made, the statute governs as to the jurisdiction, character, duty and duration of the court. The order for an election establishes the court, and the court when established exists under and by virtue of the statute. We are to look to the statute, not to the resolution of the common council, for the character, powers and duties of the court. The statute is the organic law of the corporation, and is to the common council what the Constitution of the State is to the Legislature. A municipal council have as little power to change the character and duties of an office prescribed by a legislative enactment as the State Legislature to change those of an office created and defined by the Constitution of the State. The city court exists by virtue of the statute, and so, also, does the office of its judge. If the common council had undertaken to violate the paramount law, their action so far as it was a violation of that law would be void. If they had attempted to create some other court than that provided by the statute their action would have been without force. But we do not understand their resolution as making any such at-

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tempt. On the contrary, the clause, "until his successor shall have been elected and qualified," plainly discloses the intention to obey the statute and bring into existence a permanent court, as it contemplates and requires. Whether they might by ordinance abrogate the office is a question not before us.

The appellee appeared in the city court, filed answer, and, without interposing any objections, suffered judgment. In this court it is contended that the notice issued to the principal defendant was insufficient, and that the entire proceedings were therefore void. The notice itself is not set out in the record, but the judgment of the city court recites that notice of the non-residence of the defendant had been published for more than thirty days before the day set for trial, and, therefore, affirmatively shows some notice. It is settled that proceedings in a court having jurisdiction of the subject-matter of the action can not be collaterally attacked, if it appear that there was some notice, although it is defective. *Muncey v. Joest*, 74 Ind. 409; *Hume v. Conduitt*, 76 Ind. 598; *McAlpine v. Sweetser*, 76 Ind. 78; *Stout v. Woods*, 79 Ind. 108.

It is not necessary for a justice of the peace to copy into the record the summons, and the same rule must apply to notice of publication or other process issued against the defendant. *Taylor v. McClure*, 28 Ind. 39; *Baldwin v. Webster*, 68 Ind. 133; *Hume v. Conduitt*, *supra*.

The decision of the city court was made upon a notice before it, and is the determination of a jurisdictional question, and can not be collaterally impeached. This rule applies to courts of justices of the peace as well as to other inferior judicial tribunals. *Reed v. Whitton*, 78 Ind. 579; *Pressler v. Turner*, 57 Ind. 56; *Mavity v. Eastridge*, 67 Ind. 211.

A garnishee is protected by a judgment of a court of competent jurisdiction, although there may be some error or irregularity in the proceedings. A judgment by a court not having jurisdiction would not protect him; but there was in this case full jurisdiction of the subject-matter, and a conclusive determination, as against all collateral attacks, of the question

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of jurisdiction of the person of the principal defendant. The appellee is, therefore, fully protected by the judgment rendered in favor of the appellant Oppenheim.

Judgment reversed.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—The appellee insists that no question is presented upon the motion for a new trial for the reason that no exception was taken to the finding of the court upon the agreed state of facts. The whole argument upon this point proceeds on the assumption that an agreed case is the same thing as a case wherein there is an agreement as to what facts shall be taken as the evidence in the case. Section 386 of the code refers to agreed cases, and has no application to cases where there is an agreement as to the facts. The cases holding that an exception to the finding is the proper method of presenting the question of the correctness of the decision apply to agreed cases, and not to cases where the agreement is that certain facts exist and shall be taken as evidence. *Lof-ton v. Moore*, 83 Ind. 112; *Slessman v. Crozier*, 80 Ind. 487; *Downey v. Washburn*, 79 Ind. 242; *Martin v. Martin*, 74 Ind. 207; *Manchester v. Dodge*, 57 Ind. 584; *Fisher v. Purdue*, 48 Ind. 323; *Carlton v. Cummins*, 51 Ind. 478; *Western Union Tel. Co. v. Frank*, *post*, p. 480.

Some confusion has been introduced by an inadvertent misuse of the term “agreed statement of facts” where the term “agreed case” should have been used. The decision in *Thatcher v. Ireland*, 77 Ind. 486, must be understood as referring to an agreed case, not as referring to an agreed state of facts used as evidence. The record in this case recites that “the following agreement of facts was introduced as evidence,” and shows, also, that this was an ordinary suit for injunction and not an “agreed case” under the statute.

The counsel of appellee, in his brief on the petition for a rehearing, says: “The only question in this case that admits of controversy is whether by ordering an election of city judge the

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office became a permanent and continuing one without the approval of the common council," and this question we fully considered and determined in the former opinion, holding that when the city adopted the provisions of the act the court provided for by that act became a permanent and continuing one, and that the common council was not bound to go through the ceremony of readopting the provisions of the act as often as the term of office of the person elected to the office of judge expires. We think it clear that when the Legislature enacts a law providing for the establishment of a city judge, or of the office of city attorney, or street commissioner, or any office, and the municipality adopts the provisions of the law, it is adopted once for all, and that the action need not be reaffirmed as often as the terms of office expire.

Whether the council might have rescinded their action is not a question in this case, for there is no pretence that it was rescinded. The utmost that is claimed is, that there was no affirmative ordinance or resolution continuing in force the first act accepting the law enacted by the Legislature.

Nor are we dealing with the case of a direct attack upon the right of McGregor, before whom the judgment was rendered, and by whom the attachment was issued, to exercise the authority of city judge of Logansport. The case is not one against McGregor, assailing his title in behalf of the public, or on behalf of some claimant to the office; nor is it a case against him, where, in order to justify his action, he must show some right to the office claimed by him. The case is one by a citizen, who, finding McGregor in office, treated him as rightfully there, and acquired rights upon the faith of his having a right to hold it.

McGregor was elected to the office he claims; no successor was elected; there is a public act providing for the creation of such an office, and providing that one elected to fill it shall serve until the election of his successor. The appellant sued out an attachment and issued process in garnishment against the appellee; the latter appeared, submitted voluntarily, and, without objection to the jurisdiction of the court, answered

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and suffered judgment. Conceding, but by no means deciding, that McGregor was not an officer *de jure*, he was, at all events, an officer *de facto*, and his acts were valid, not, perhaps, upon this concession as to himself, but certainly so as to the public and third persons. If valid as to any person in the world, they should certainly be so as to the appellee, who had, without objection, suffered appellant to acquire rights upon the faith of their validity. In *Gumberts v. Adams Ex. Co.*, 28 Ind. 181, the court said: "The appellee appeared before the justice and went to trial without questioning his authority. He was defeated, and then appealed from the judgment to the circuit court, and there, for the first time, set up that the person before whom the proceedings were had was not a justice of the peace. Such a defence can not avail the appellee." In *Taylor v. Skrine*, Treadway, 696, the court held that the acts of one claiming to be judge, and whose claim rested on an unconstitutional statute, were valid as to the public until the invalidity was authoritatively declared, and the case is expressly approved in *Creighton v. Piper*, 14 Ind. 182. Analogous principles are laid down in *Blackman v. State*, 12 Ind. 556; *Steinback v. State, ex rel.*, 38 Ind. 483; *Feaster v. Woodfill*, 23 Ind. 493; *Case v. State*, 5 Ind. 1. The case last named is infinitely stronger than the present, even if it were conceded that the failure to adopt a second resolution determined the right of McGregor to hold the office of city judge.

We think it very plain that as both the act of the Legislature and the resolution of the common council provided that the person elected to the office of judge of the city court should hold until his successor was duly elected and qualified, the incumbent of that office, elected under the resolution of March 12th, 1875, was, at the time the judicial acts complained of were done, an officer *de jure*. Either this must be so held or we must fly in the face of a long and unbroken line of decisions, ending with the carefully considered case of *Elam v. State, ex rel., supra*.

Petition overruled.

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THE WESTERN UNION TELEGRAPH COMPANY v. FRANK.

ASSIGNMENT OF ERROR.—Practice.—Supreme Court.—Agreed Statement of Facts.—Where the evidence upon a trial consists of an agreed statement of facts, conclusions of law can not be stated; and a specification, "The court erred in its conclusions of law upon the agreed statement of facts," presents no question.

SAME.—Specification.—Conclusions of Law.—A specification, "The court erred in rendering judgment upon said conclusions of law," presents no question for consideration.

SAME.—New Trial.—Bill of Exceptions.—In such case, to question the correctness of the finding, a motion for a new trial is necessary, and the agreed statement must be incorporated in the record by a bill of exceptions, or otherwise.

From the St. Joseph Circuit Court.

W. G. George, for appellant.

G. Ford, for appellee.

FRANKLIN, C.—Appellee sued appellant for the statutory penalty for failing to transmit a message. The suit was commenced before a justice of the peace; trial and judgment for appellee, and appellant appealed to the circuit court.

In the circuit court the cause was submitted for trial upon an agreed statement of the facts. The court found for appellee in the sum of \$100, and rendered judgment upon the finding. The errors assigned in this court are:

1st. The court erred in its conclusions of law upon the agreed statement of facts.

2d. The court erred in rendering judgment upon said conclusions of law.

Neither of these specifications of error presents any question for consideration. No motion for a new trial was made, and no bill of exceptions was filed, embracing the agreed statement of facts as the evidence. It was not a proceeding under the 386th section of the code of 1852 (R. S. 1881, sec. 553), for there was no affidavit attached as therein required. The difference between submitting a case under that section and

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the use of an agreed statement of facts as the evidence, upon the trial of issues regularly formed, has been recognized in a number of decided cases. *Slessman v. Crozier*, 80 Ind. 487; *Downey v. Washburn*, 79 Ind. 242; *Godfrey v. Wilson*, 70 Ind. 50; *Manchester v. Dodge*, 57 Ind. 584.

Under the provisions of the 341st section of the code of 1852 (551st section of the revision of 1881), there can be no conclusions of law stated unless based upon the finding of the facts and at the request of one of the parties. In this case there were no disputed facts to find, and, as there could be no conclusions of law stated, the finding could only amount to a general finding for the plaintiff; and the specification in the assignments of errors, that "The court erred in rendering judgment upon said conclusions of law," presents no question for consideration.

The judgment below must be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it in all things affirmed, with costs.

No. 9004.

BARTON ET UX. v. MCWHINNEY.

TAX SALE.—Possession Under Certificate.—Statute Construed.—Under section 203 (1 R. S. 1876, p. 120), the certificate of a tax sale entitles the holder to the possession of the premises described only in case the sale was regular and valid.

SAME.—Liability for Rents and Profits.—The holder of an invalid certificate of tax sale is not accountable to a junior lien-holder for rents of the land, unless he has had possession under his certificate or has received rents.

SAME.—When Invalid.—A tax sale of land is invalid when personalty might have been seized and sold.

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SAME.—*Municipal Tax Sale.*—The act of March 11th, 1875, makes the assessment law of December 21st, 1872, applicable to towns and cities, and, consequently, the holder of an invalid city tax deed is entitled to 25 per cent. interest, as provided in that law.

SAME.—*Practice.—Pleading.*—Upon a complaint to recover the possession or to quiet the title of land, the holder of an invalid tax deed may have a decree enforcing the statutory lien given in such cases.

SAME.—*Interest.*—The act of March 10th, 1879, has reference to interest on contracts for the forbearance of money or upon debts, and does not repeal the provisions of the assessment law in respect to interest upon invalid tax deeds.

VERDICT.—A general verdict or finding need not show the facts on which it rests. It need only state a conclusion broad enough to cover the issues.

STATUTE.—*Preamble.—Enacting Clause.*—An act of the Legislature is not invalid because the enacting clause is preceded by a preamble.

SAME.—*Oppressive Law.*—If a law be constitutional the courts can not declare it invalid because unreasonable and oppressive.

From the Superior Court of Marion County.

J. Buchanan, for appellants.

J. T. Lecklider, for appellee.

WOODS, C. J.—Complaint by the appellant Henry P. Barton. In the first paragraph it is alleged in substance, that on the 15th day of May, 1877, at a commissioner's sale made upon a decree of foreclosure of a mortgage executed September 20th, 1873, the plaintiff purchased certain described real estate, took possession of the same on the 1st day of September, 1878, and, in 1879, received the commissioner's deed in consummation of the sale, becoming thereby the owner of the property; that on the 8th day of February, 1875, the defendant McWhinney purchased the property at a tax sale by the county treasurer, for the sum of \$119.44, and received a certificate of purchase, whereby he became and was entitled to the possession from the last named date, and thereby, from that date until September 1st, 1878, excluded the plaintiff from possession; that the rental value of the property during that time was \$50 per month, and largely exceeded the amount due on the defendant's claim, with penalty and interest, but, neglecting to give credit for the same, the defendant had taken and

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was asserting title under an auditor's deed. Prayer for an accounting, etc.

The second paragraph is to quiet title, and the third to procure a cancellation of tax deeds, which are shown to be invalid, because of the failure to seize and sell personally.

The appellee answered by a general denial, and filed a cross bill, to which the plaintiff's wife was made a defendant. The first paragraph of the cross bill is in the ordinary form to quiet title. In the second paragraph the appellee alleges his purchase of the property at tax sale by the county treasurer, on the 8th day of February, 1875, and receipt of the certificate of sale, and afterwards of the tax deed; the amounts of his bid at the sale and of his subsequent payments of taxes; also, a purchase of the property at a tax sale made by the city treasurer of Indianapolis, the issuing to him of the certificate of sale, and afterwards of the tax deed; the amounts of his bid and of subsequent payments of city taxes assessed against the property; the prayer of this paragraph being that the title under the tax deeds be quieted, but that if it should be found defective, the appellee should recover the amount of his bids and payments, with interest and penalties.

Saving an exception to the overruling of their respective demurrers for want of facts to each paragraph of the cross bill, the appellants each answered by a general denial. The issues joined were submitted for trial to the court, which made a finding of the tenor and effect following: "The court * * finds for the defendant and cross complainant, McWhinney, and against the plaintiff Barton, and against the defendant Fanny E. Barton; and finds that the defendant and cross-complainant, McWhinney, claims the property * * by virtue of certain tax title deeds;" (here follows a detailed statement of the sales, deeds, amounts bid, subsequent payments of taxes, etc.;) "and the court further finds that each of the said deeds is invalid, and ineffectual to convey title, but that the said deeds are sufficient to and do carry and support liens on the said real estate for the amount of all taxes and charges paid

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thereon by McWhinney, who is entitled to recover of and from said Henry P. Barton such legal taxes and charges, together with interest thereon at the rate of twenty-five (25) per cent. per annum from the date of sale, and like interest on all subsequent payments," etc.

The judgment rendered is, that "Henry P. Barton, plaintiff, pay to the said defendant Frank McWhinney, the sum of \$1,563.50 * * within thirty days from this date, September 11th, 1879, and, in default of such payment, that said real estate, or so much thereof as may be necessary, be sold," etc.

The judgment contains no order for a personal execution against Barton; and it is, therefore, a mistake of counsel for the appellant to say that the court gave a personal judgment against him. If, however, such personal judgment had been rendered, there should have been a special exception or motion to modify the entry in order to present the question on appeal. *Kissell v. Anderson*, 73 Ind. 485; *Adams v. LaRose*, 75 Ind. 471; *Merritt v. Pearson*, 76 Ind. 44.

Counsel further claims that there is a general finding for the cross complainant, which he says is equivalent to a denial that the plaintiff Barton had title to the land as alleged in his complaint; and upon this assumption insists that the court committed material error in excluding certain evidence which tended to establish title in the plaintiff, for instance, the mortgage under which he purchased. While the first clause of the finding, standing by itself, is a general finding in favor of McWhinney, upon which, under the first paragraph of his cross bill, he might have been entitled to a judgment declaring his title absolute, yet, upon the entire finding, it is clear that such a judgment could not be rendered. The entire finding means simply that under his tax deeds, by which alone he claimed, McWhinney was entitled to a lien, and if this is not broad enough to cover all the issues, the remedy should have been sought by a motion for a *venire de novo*. The finding, however, would seem to be broad enough. The object of the complaint was to quiet the plaintiff's title against the claim

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of the appellee, whatever it was ; the court found just what it was, and that it was superior as a lien to the rights of the plaintiff ; what those rights were it was not necessary to determine, and as the excluded evidence could not have changed the result in this respect, it is not important to enquire whether the evidence was, strictly speaking, competent.

It is insisted, however, that, by virtue of his certificate of purchase at the tax sale, the appellee was entitled to the possession of the property sold, and, therefore, was accountable to the plaintiff under the first paragraph of the complaint for rent until the time when the plaintiff obtained possession ; and that if the court had so applied the law, and had admitted the evidence offered by the appellants, the finding must have been for the plaintiff.

The statute in force at the time of the sale in question contained the provision that the "certificate shall entitle the holder to the possession of the premises described ;" but the fallacy of the position taken by the appellant is in the failure to distinguish between a certificate issued upon a sale in all respects regular and valid, and one issued upon an irregular and invalid sale. The complaint does not show nor allege that the sale in this instance was regular ; the evidence shows, and the finding is, that it was invalid. The complaint does not allege that the appellee obtained possession under his certificate ; on the contrary, the evidence shows without dispute, that he did not have possession nor receive the rents and profits, but the mortgagor, in the mortgage under which the plaintiff obtained title, was in the actual possession and enjoyment of the property during the period for which it is claimed that the appellee should have been held accountable. The sale having been invalid, the appellee could have received no aid from the law to obtain possession, and the law will not by construction declare him to have had what it would not have helped him to assert or to maintain. Whether or not, if the property had been unoccupied, and the purchaser could have taken peaceable possession, he ought to have entered and

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should be held accountable as if he had, we do not consider; neither do we consider whether, in case of a valid sale, he would be held bound to apply the rents, if received, towards a redemption from the sale.

It is next claimed that the finding is contrary to the law and evidence, for the reasons following:

First. Because, under section 256 of the act of December 21st, 1872, a lien can be declared in favor of the purchaser at a tax sale only "in case judgment shall be rendered against" him "for the recovery of such land in an action of ejectment or other action either at law or in equity."

The finding in this instance is express, and the judgment implies, that the tax deeds of the appellee did not vest in him the title; and, as against the appellee, the judgment is just as effective to establish the plaintiff Barton's right to the fee of the land as if there had been an express finding and judgment to that effect.

Second. "Because the findings do not specify for what reason the tax deeds are invalid. The record must affirmatively show in all cases a sufficient cause to support the judgment rendered, else the judgment is erroneous."

The finding in this case is not in the technical sense special, but general; and it is not necessary that such a finding shall show the facts which support it; it is enough if it contain the statement of a conclusion broad enough to cover the issue. It is stated in this finding that the deeds were sufficient "to carry and support liens" in favor of the appellee; and this necessarily implies that the deeds were not invalid for any of the causes "enumerated in the preceding section" to section 256, *supra*, which make the sale invalid for all purposes, except that the purchaser may reclaim his money of the treasurer who made the sale. It was not necessary that it should be averred in the cross bill that the sale was invalid and for what reason, because, by the terms of section 256, *supra*, as interpreted in the decided cases, the court may, upon a complaint in ejectment or to quiet title, find the amount

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due the holder of an invalid tax deed, and decree a foreclosure of the lien which the law gives in such cases. *Brown v. Fodder*, 81 Ind. 491; *Jenkins v. Rice*, 84 Ind. 342.

It follows that copies of the tax deeds were not required to be filed with the pleadings. The evidence shows that there was personal property which might have been levied upon, and this was enough to support the finding that the deeds were ineffective to convey title, but good to establish the lien.

It is urged that the damages are excessive, because the allowance of twenty-five per cent. upon taxes paid to the city was unlawful.

"The act of December 21st, 1872, does not apply to cities," says counsel, "and the act of March 11th, 1875, 1 R. S. 1876, pp. 338, 339, supposed to be an attempt to make this act apply to towns and cities, utterly fails of its purpose. * * This act is void for several reasons: 1st The enacting clause is wanting. * * * 2d. Section 2 attempts to adopt a general law of the State, 'approved December 2d, 1872.' There is no such general law. It, therefore, fails to adopt any. It attempts to adopt such law only 'for the assessment of taxes,' not for the collection and redemption therefrom. * * * 3d. This entire act is void, because in conflict with section 21, article 4 of the Constitution, which provides that 'No act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length.'"

The act referred to contains the enacting clause prescribed by the Constitution; and the fact that this clause is preceded by a preamble explanatory of the reasons for its passage does not invalidate the act. The Constitution says that "the style of every law shall be, 'Be it enacted,' " etc., and doubtless this clause should precede everything which is made and declared to be law; but this by no means forbids the use of a preamble.

While the reference in the second section is to an act approved December 2d, 1872, it is clear from the title and other

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provisions, that the act of December 21st, 1872, was intended; and we deem it equally manifest that the legislative intent was to make the provisions of that act, so far as relevant to "the assessment and collection of taxes," applicable to towns and cities. The language of the second section is: "Hereafter the general law of the State and amendments thereto, approved December 2 (1), 1872, for the uniform assessment of taxes, shall apply to all incorporated cities and towns not having special charters, so far as the same shall be applicable." So far as consistent with the title of the act, this makes all the provisions of that law applicable unless of such a nature as to be incapable of reasonable application. See *Board, etc., v. Wasson*, 74 Ind. 133.

The title of the act embraces the assessment and collection of taxes, and the only reason on which we are asked to say that the provisions of sections 256 and 257 do not apply is because the provision for allowing twenty-five per cent. interest or penalty is oppressive and unreasonable. That, however, is not a subject for judicial cognizance; it is not for the court to say that a constitutional law shall not have effect, because it is in the judgment of the court unreasonable.

We do not consider the act of 1875 obnoxious to the Constitution. If section 2 had been embodied in the act of 1872, its validity could not be assailed; and it is no less valid where it is found. It is not a revision nor an amendment of any act or section of an act. If by implication it repeals or modifies the provisions of any other law, it is not therefore unconstitutional. *Branham v. Lange*, 16 Ind. 497.

In the 8th section of the act of March 10th, 1879, Acts 1879, p. 44, it is provided that all laws on the subject of interest are hereby repealed; and counsel for the appellant says: "This statute took effect prior to September 11th and 16th, 1879, the days of this trial and assessment of damages. It was, therefore, erroneous for the court to compute interest at a greater rate than six per cent., as provided in section 3 of this act."

The State, *ex rel.* Baldwin, Att'y Gen., v. Board of Com. of Co. of Marion.

We do not think the rights of the parties affected by the act referred to. The act itself and the repealing clause have reference to interest on contracts for the forbearance of money or upon debt, and existing contracts are saved from the force of the repeal. We find no error in the record.

Judgment affirmed, with costs.

No. 10,031½.

THE STATE, EX REL. BALDWIN, ATTORNEY GENERAL, v. THE
BOARD OF COMMISSIONERS OF THE COUNTY OF MARION.

ATTORNEY GENERAL.—*Common School Fund.—Property Found on Bodies by Coroner.*—The proceeds of effects found by the coroner on the bodies of dead persons do not belong to the common school fund, but go to the support of the common schools of the county, and a suit to compel its proper application can not be prosecuted on the relation of the Attorney General.

SAME.—*Costs.*—There is no error in refusing to render a personal judgment for costs against the Attorney General, where he, on behalf of the State, unsuccessfully prosecutes a suit on his relation as an officer, against a county, involving the right to public moneys.

From the Marion Circuit Court.

D. P. Baldwin, Attorney General, for appellant.

A. C. Harris, for appellee.

NIBLACK, J.—The State, on the relation of Daniel P. Baldwin as Attorney General, filed a claim against Marion county before the board of commissioners of that county, but the claim was rejected by the board.

The State appealed to the circuit court, where an amended complaint was filed, to which a demurrer was sustained by that court, and where there was final judgment upon demurrer in favor of the board of commissioners. The court, however, upon motion, refused to tax the costs against the relator personally.

The State, *ex rel.* Baldwin, Att'y Gen., v. Board of Com. of Co. of Marion.

Error is assigned upon the sustaining of the demurrer to the complaint as amended, and cross error is assigned upon the decision of the court refusing to tax the costs against the relator.

The substantial part of the amended complaint was as follows:

“The relator says that he is the Attorney General of the State of Indiana, duly elected and qualified and occupying said office; that the officers of Marion county, Indiana, to wit, the treasurers thereof, within the last twenty years, have collected from the proceeds of coroners' inquests, and from money and valuables found upon the dead bodies of persons dying in Marion county, Indiana, by violence or casualty, within twenty years last past, over and above the burial expenses, and which have not been called for or claimed by the legal representatives of such decedents, the sum of \$687.77; that by law said money belongs to the common school fund, or to the common schools of Marion county, Indiana, and that it was and is the duty of said treasurers to loan the same and pay over the interest thereof to the schools of said county; that the interest upon said funds amounts to \$905.94; that neither principal nor interest has ever been applied to common schools; that this relator has demanded of said board of commissioners of Marion county, that the statutes made and provided in the premises shall be carried out, and said moneys be set apart for the use of common schools, which said board refuses to do, or to account for the same, or to account in any way for the interest thereof, claiming that said moneys belong to the said county, and pleading to said demand the statute of limitations.” Here followed an itemized statement of the amounts received by the county treasurers from the coroners of Marion county, and the interest claimed to be due on said amounts, arising from money and valuables found upon dead bodies at inquests, making an aggregate of \$687.77 received by said treasurers, and of \$905.94 interest demanded thereon. “Wherefore the relator asks that the court will make an order that an accounting be had in the

The State, *ex rel.* Baldwin, Att'y Gen., v. Board of Com. of Co. of Marion.

premises, and that said moneys, principal and interest, be invested for the benefit of the common schools of Marion county, and be taken from the county fund, where they now are, and declared to be held in trust for the benefit of said common schools. And the relator asks for costs and other proper relief in the premises."

The law defining the powers and duties of the Attorney General, which was in force when this action was commenced, provides that "It shall be the further duty of the Attorney General to ascertain, from time to time, the amounts paid to any public officer of the State or any county officer or other person, for unclaimed witness fees, court docket fees, licenses, money unclaimed in estates or guardianships, fines or forfeitures, or moneys that escheat to the State for want of heirs, or from any other source, where the same is, by any law, required to be paid to the State or to any officer in trust for the State; and in all cases where the officers whose duty it shall be to collect the same shall fail, neglect, or refuse, for twelve months after the cause of action in favor of the State shall have accrued, or shall fail, neglect, or refuse, to sue for and proceed to recover any property belonging to or which may escheat to the State, the said Attorney General shall institute, or cause to be instituted and prosecuted, all necessary proceedings to compel the payment of or recovery of any such property." R. S. 1881, section 5668.

The eleventh section of "An act prescribing the powers and duties of coroners," approved May 27th; 1852, as amended by the act of March 29th, 1879, provided that where there was no known person lawfully authorized to take possession of any money or other valuables, found with any dead body, the coroner should immediately deliver such money or other valuables to the treasurer of the county, who was required to deliver the same to any person legally authorized to receive it or them, within one year thereafter, first retaining so much as was necessary to pay the expenses of the coroner's inquisition and funeral expenses of the body.

The State, *ex rel.* Baldwin, Att'y Gen., v. Board of Com. of Co. of Marion.

Section twelve of the same act further provided that it should be the duty of such treasurer, if the money which thus came into his hands should not be called for within one year from the time of his receiving the same, "to loan it out on interest of not less than seven per centum per annum, to be applied to common schools, equally to be divided among the townships of said county." 2 R. S. 1876, p. 20; Acts 1879, p. 105.

On behalf of the Attorney General, it is conceded that the unclaimed moneys received by the county treasurers from the coroners are not expressly made a part of the permanent school fund of the State by the eighth article of the State Constitution, but it is claimed that section twelve of the coroner's act, *supra*, which was approved May 27th, 1852, transferred and set apart those moneys to the common school fund, and that, under the operation of the third section of that article of the Constitution, such moneys can not now be diverted to any other purpose, and that, by the provision of the statute first above quoted, it is made the duty of the Attorney General, when such moneys are applied to other than common school purposes, to institute proceedings, in the name of the State, to reclaim said moneys and to require that the accrued as well as the accruing interest, for which the counties are responsible, shall be devoted to the support of the common schools under the general school laws of the State.

As has been seen, the Attorney General is only authorized to sue for and to recover such money and property as the State is entitled to receive, or as some officer is authorized to hold in trust for the State.

Section twelve, *supra*, does not purport to set apart either the principal or the interest of the money in question to the general school fund of the State, or to confer upon any officer of the State any authority over it. It permits the principal to remain in charge of the respective county treasurers, and expressly directs that the interest shall be divided between the several townships of the proper county, thus necessarily

The State, *ex rel.* Baldwin, Att'y Gen., v. Board of Com. of Co. of Marion.

imposing upon the counties, and not upon the State, the duty of distributing the interest to the townships entitled to receive it. *State, ex rel. Hamilton, v. Forkner*, 70 Ind. 241.

We are, therefore, unable to give to that section any construction which confers upon the Attorney General the right to prosecute any suit concerning the money, whether principal or interest, to which it has reference.

It is further claimed, on behalf of the Attorney General, that the failure of the persons entitled to receive the same, to call for the moneys paid over to the treasurer by the coroner, for one year after the treasurer has come into the possession of such moneys, works a forfeiture to the State of such unclaimed moneys, by which means they are carried into the general school fund of the State, and become moneys for which the Attorney General may prosecute an action, independently of section twelve, herein above referred to, in the name of the State.

Article eight of the Constitution, *supra*, declares that moneys arising "from all forfeitures which may accrue" shall constitute a part of the common school fund of the State, and, as has been shown, the Attorney General is, when others have failed for a time to do so, expressly authorized by the statute prescribing his duties, to sue for and to recover money due from forfeitures to the State, referring, as we construe the statute to mean, to the class of forfeitures mentioned in the Constitution.

Forfeitures are of different kinds. A forfeiture may be generally defined to be the loss of what belongs to a person in consequence of some fault, misconduct or transgression of law. In the connection in which the term "forfeitures" is used in the Constitution, it evidently means the loss of a certain sum of money as the consequence of violating the provisions of some statute, or of the refusal to comply with some requirement of law. Burrill's Law Dictionary, title Forfeiture. Under our present system of statutory laws, the term has a practical application mainly to forfeited recognizances.

When the money or property found with a dead body is delivered over to the county treasurer, he becomes its lawful custodian and entitled to hold it as a fund in his hands, as against every one except the real owner, and the failure of the owner to assert his right to such money or property can not, in the absence of a statute so declaring, work a forfeiture of the treasurer's authority to retain it under the law requiring him to take charge of it.

The cross error assigned by the appellee presents a question of some difficulty. The question of costs is one over which the courts in many cases have a discretion, and this being a case in which the State was practically the plaintiff, and one of its subordinate municipal corporations was defendant, involving questions concerning the custody and control of public funds, we do not feel at liberty to say that the court erred in refusing to render judgment against the relator for costs.

The judgment is affirmed, without costs.

No. 9386.

EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY
v. MONTGOMERY.

PRACTICE.—*Error in Evidence Cured by Instruction.*—An error in admitting improper evidence may be cured by an instruction which, in effect, directs the jury to disregard such evidence.

WITNESS.—*Foundation for Impeachment.*—*Time and Place.*—An impeaching question which calls for a statement made "in June last, in Hazelton, Indiana," is sufficiently definite as to time and place, when the principal witness admits a conversation at such time and place, though denying the particular statement imputed to him.

From the Gibson Circuit Court.

A. Iglehart and J. E. Iglehart, for appellant.

J. E. McCullough, for appellee.

85	494
149	321
85	494
148	186

Evansville and Terre Haute Railroad Company v. Montgomery.

WOODS, C. J.—The appellee obtained judgment against the appellant for breach of a contract of affreightment, whereby the appellant undertook to carry flour for the appellee from Petersburg, Indiana, to New Orleans. It is claimed that the jury gave excessive damages, and that the court admitted improper evidence, both on the subject of damages and in impeachment of a witness.

A witness stated the value of a part of the flour at Petersburg, but excepting this the evidence on the subject was confined to values at New Orleans, and in its instructions the court charged the jury that the damages should be estimated from the proof of values at New Orleans. It is clear that the appellant was not harmed in the respect complained of by the evidence of the value of the flour at Petersburg.

In reference to the impeachment, the objection is urged that the time and place were not fixed with sufficient definiteness in the question put to the principal witness. The time and place as stated in the question were, "in June last, in Hazleton, Indiana." The witness admitted having had a conversation with and in the presence of the parties named, "at Hazleton, in June last," but denied saying what was imputed to him. The impeaching witness testified to a conversation at the same time and place, and there can be no doubt that both witnesses spoke in reference to the same conversation, concerning which the principal witness had been required to answer. There was, therefore, no error in this particular. *Bennett v. O'Byrne*, 23 Ind. 604; *Wilkerson v. Rust*, 57 Ind. 172; *Lawler v. McPheeters*, 73 Ind. 577.

There was sufficient evidence to support the finding of the jury in respect to the amount of damages, and we will not undertake to determine its credibility or relative weight.

Judgment affirmed.

Jarboe v. Severin et al.

No. 9669.

JARBOE v. SEVERIN ET AL.

MARRIED WOMAN.—*Statute of Frauds.*—*Vendor and Vendee.*—*Implied Promise.*—*Contract.*—*Consideration.*—A married woman joined her husband in the conveyance of his lands, in consideration of which the vendee orally agreed to convey to her a city lot, which he afterwards refused to do.

Held, that a complaint by the wife against the vendee for failure to perform his agreement, showing these facts, was good on demurrer.

Held, also, that the release by a wife of her inchoate interest in her husband's lands may be a valuable consideration.

Held, also, that the above facts give rise to an implied promise by the vendee that he will either return what he has received or its value, as being held by him on a consideration which has failed.

SAME.—*Husband and Wife.*—*Conveyance.*—*Presumption.*—Where a wife joins with her husband in the conveyance of his land, it will be presumed, in the absence of any special agreement to the contrary, that the inducement for the release of her inchoate right as to the grantee was the consideration paid by him for the land.

From the Clay Circuit Court.

S. W. Curtis, for appellant.

G. A. Knight and *C. H. Knight*, for appellees.

BLACK, C.—The appellant sued the appellees, the complaint being in two paragraphs. The first paragraph alleged, "that on the — day of —, 1876, the defendants, in consideration that the plaintiff would join her husband, William Jarboe, in the conveyance of certain real estate situated in Clay county, Indiana, which defendants had purchased of her said husband, then of the value of twenty thousand dollars, in which this plaintiff had an inchoate interest in one-third of the value of two thousand dollars; that they would, in consideration as aforesaid for her said conveyance of her inchoate interest in and to her said husband's land so purchased as aforesaid, convey to her lot number seventeen, in John Hendrix's fourth addition to the town of Brazil, then of the value of two thousand dollars. And plaintiff says that, in pursuance of said purchase and sale so made, she did join her

85	496
139	423
85	496
142	155
85	496
144	14
145	69
147	680
85	496
148	641

Jarboe v. Severin et al.

said husband in the conveyance of the real estate so purchased by the defendants, and thereby conveyed to them her inchoate interest in and to said lands; that said conveyance included all the lands then owned by her said husband. She further says that after said defendants had procured said conveyance as aforesaid, and said deeds delivered to them, they refused to convey to this plaintiff said lot seventeen, though often requested so to do. Plaintiff further says that said agreement to convey lot seventeen was for the purchase price of her inchoate interest in and to the lands sold to said defendants by her said husband, and that she would not have parted with her rights in and to said lands except upon the fraudulent promises of the defendants as above set forth. Wherefore she says said defendants are indebted to her in the sum of two thousand dollars, for which she asks judgment and all proper relief, and that said amount be declared by this court a lien upon lot seventeen," etc.

The second paragraph alleged, in substance, that appellant's husband was the owner of certain lands in said county, describing them, in which she had an inchoate interest of one-third; that the lands were worth fifteen thousand dollars; that her husband, being indebted to appellees, had mortgaged said lands to them, to secure said indebtedness; that on, etc., appellees purchased of her husband his fee simple interest and her inchoate interest, and agreed to pay therefor by conveying to appellant said lot in Brazil; that her husband conveyed all their right, title and interest in said lands by deed duly acknowledged, and appellees took possession of said lands, but have failed and refused to convey said lot to appellant, though often requested so to do; that said lot and her inchoate interest in said lands were each worth two thousand dollars. Prayer as in the first paragraph, except that it is asked that the lien be declared on said lands.

Appellees demurred to each paragraph of the complaint, and the demurrer was sustained. Appellant declined to

Jarboe v. Severin *et al.*

amend or to plead further, and judgment was rendered for appellees. The ruling on the demurrer is assigned as error.

The contracts for the conveyance of said lot stated in the complaint, not being alleged to have been in writing, must be regarded as verbal. *Carlisle v. Brennan*, 67 Ind. 12. Therefore, the complaint can not be regarded as sufficiently setting forth a cause of action for damages for breach of an agreement to convey land.

Are facts sufficient alleged to show a right of recovery because of the performance of the consideration under a contract which can not be enforced, and which the promisor refuses to perform?

The release by a wife of her inchoate interest in her husband's real estate may be a valuable consideration. *Hollowell v. Simonson*, 21 Ind. 398; *Brown v. Rawlings*, 72 Ind. 505. In *Farwell v. Johnston*, 34 Mich. 342, it is said: "It has always been held that a release by a wife of an interest which was within her own option to release or not—as, for example, a right of dower—is a valuable consideration, which will support a post-nuptial settlement, and therefore will suffice for any other purpose."

It is insisted, on behalf of appellees, that if there can be any recovery at law, as it can not be had upon the express promise, it must be upon a promise which the law will imply from the facts; and that when a married woman has joined her husband in the execution of a deed of conveyance of his real estate, for the purpose of releasing her inchoate interest therein to the grantee, and she has herself received no separate compensation therefor from the grantee, the law will not imply a promise on the part of the grantee to pay her what her inchoate interest was worth, and that, therefore, appellant has no remedy.

We think that where a wife has joined with her husband in the execution of a deed of conveyance of his land, it should be presumed, in the absence of any special agreement to the contrary, that the inducement for the release of her inchoate

Jarboe v. Severin *et al.*

right, as to the grantee, was the consideration paid for the land by the grantee to her husband, and not that she was separately paid or promised anything by the grantee.

It is also plain that where damages can not be recovered for breach of an agreement, because of the statute of frauds, a party to it who has performed his part must, in an action at law, recover upon an agreement implied by the law from the facts. But the implied agreement upon which the party who has performed his part of the contract recovers in such a case does not arise as supposed by counsel. Where, in pursuance of an express verbal contract for the purchase of land, the vendee has paid money, conveyed real estate, delivered personal property or performed service, and the vendor refuses to convey, the action, whatever its form, by which the vender recovers, is, in fact, not based upon an implied promise of the vendor arising from the vendee's payment, conveyance, delivery or rendering of service.

These benefits were, in truth, conferred on the vendor and received by him under a special agreement, and "The law * * * presumes a promise only where it does not appear that there is any special agreement between the parties." 2 Greenl. Ev., sec. 103. The promise which, in such case, the law implies is, that the vendor, unable or unwilling to perform his special agreement, *will return* whatever he has received thereunder or its value, as being held by him upon a consideration which has failed. Browne Stat. Frauds, sec. 118.

In *Burt v. Bowles*, 69 Ind. 1, it is said: "It is a familiar principle that money paid, or personal property delivered, or real estate conveyed, under a void contract or a contract which can not be enforced, may be recovered back or compensation recovered therefor. In the case before us, as the alleged express contract of Bowles can not be enforced, the implied contract arises at once that he will return the property he obtained under it, or render compensation therefor." 2 Chit. Pl. 287, note; *Wiley v. Bradley*, 60 Ind. 62.

That the appellant may recover the value of her inchoate

Jarboe v. Severin *et al.*

interest which she released to appellants by joining her husband in the execution of the deed of conveyance of his lands, it will be necessary to prove the special contract; but this is not forbidden by the statute, which merely provides that no action shall be brought upon the contract.

The second paragraph of the complaint alleges that appellees purchased of appellant's husband his fee simple interest and her inchoate interest, and agreed to pay therefor by conveying to appellant said town lot, and that her husband conveyed all their right, title and interest in his said lands by deed duly acknowledged, etc.

This may be taken as averring that she and her husband united in a deed of conveyance by which he conveyed his interest and she released her interest, and that the promise to convey the lot to her was made to her husband.

If this contract had been in writing, she could have recovered upon it in her own name, it being made for her benefit. It was not necessary for her to be a party to such a contract to enable her to take the benefit thereof; but the contract not being in writing she could not recover upon it. The appellees having received a valuable interest from her under the verbal contract, she can, upon their refusal to convey, recover back, what she could recover if the promise had been made by the appellees to her, the value of what she parted with, that is, the value of her inchoate interest.

The interest of her husband was parted with by him for her benefit, and all his rights in the subject-matter of the contract passed to her as a gift; and we think that the right to recover back the value of the portion of the consideration furnished by her husband, upon failure or refusal of the appellees to convey, passed to her, and that she may recover the value of her husband's interest in the lands as well as that of her inchoate interest therein, though it involve proof of the special agreement. Her action to so recover is not an action upon the contract within the meaning of the statute of frauds.

Maynard *et al.* v. Shorb.

Both paragraphs of the complaint are very loosely and carelessly drawn; yet we think that each of them states facts sufficient to constitute a cause of action.

The question whether the facts stated constitute a cause of action for specific performance has not been argued, and we do not decide it.

The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellees, and that the cause be remanded with instructions to overrule the demurrer to the complaint.

No. 9369.

MAYNARD ET AL. v. SHORB.

PRACTICE.—Finding.—*When Court May Hear Further Evidence After Entry of.—Attorney's Fees.*—Where, in an action upon a promissory note, a trial is had by the court, the finding announced, and entered on the docket, leaving a blank for the insertion of the amount of the recovery when computed, the court may, after overruling motions for a new trial and in arrest, hear evidence, over defendant's objection, in respect to the amount of the attorney's fee stipulated for in the note.

From the Whitley Circuit Court.

C. Clemans and A. C. Clemans, for appellants.

J. W. Adair, for appellee.

WOODS, C. J.—The appellee sued the appellants upon a promissory note containing a promise to "pay all attorney's fees and costs and charges for collection." The appellants answered by the general denial only, and the issue was submitted to the court for trial without a jury. The plaintiff put the note in evidence, and this was all the evidence offered. Thereupon the court announced that its finding would be for the plaintiff, and directed the plaintiff's attorney to calculate

Maynard *et al.* v. Shorb.

the amount due, and at the same time noted upon the docket a finding for the plaintiff, leaving a blank for the insertion of the amount when determined. The defendants then filed a motion for a new trial, and, on the overruling of that, filed a motion in arrest of judgment, which was also overruled. After all these things were done, the plaintiff on motion was permitted to offer evidence to show what was a reasonable attorney's fee in the case.

The appellants objected to the admission of this evidence on the ground that it could not properly "be introduced while the former record remained in force and not set aside, and that the cause had been disposed of by the court."

If good in law, the objection in this case was not true in fact. The cause had not been disposed of in respect to the amount of the finding; and while we do not dissent from or wish to limit the scope of the decision made in *Wright v. Hawkins*, 36 Ind. 264, relied upon by the appellants, we do not think the court is shown, in the record before us, to have transcended the limits of a reasonable discretion; and certainly it does not appear that the appellants suffered a substantial injury or were deprived of any valuable right or privilege. The complaint contains an averment in respect to the attorney's fees under which the evidence was admissible, and as the finding which was entered was confessedly incomplete, a blank being left for the purpose of inserting the amount due when determined, it was not improper for the court in its discretion to admit further evidence in reference to the amount with which the blank should be filled. Until the blank, thus left for the avowed purpose of being filled, had been in fact supplied, it could hardly be said that the court had made a formal finding, and it is only when such a finding has been entered or at least announced, that the rule declared in *Wright v. Hawkins*, *supra*, applies, that judgment must follow the finding, "unless the court, upon proper application, and for good cause shown, may grant a new trial, award a *venire de novo*, or arrest the judgment."

 Johnston v. Griest.

In the case referred to the court had entered a complete finding for the plaintiff, and five days afterwards, of its own motion, set that finding aside, and entered a finding for the defendant. Of such a proceeding it may well be said that "when the court has rendered a general finding for one of the parties, it can not, of its own motion and arbitrarily, set aside such general finding, and render a general finding and judgment for the other party. Such a course might deprive a party of substantial rights." This plainly has no application to cases like the one now presented.

Judgment affirmed.

 No. 10,175.

JOHNSTON v. GRIEST.

CONTRACT.—*Gift.*—*Promise.*—*Construction of Contract.*—G. executed to J. a writing as follows: "January 1st, 1876. This will certify that I do give to J. \$100, the money to be paid as soon as my financial condition will allow; and if I do not live to pay it, I wish it paid out of my estate." Suit thereon by J. against G.

Held, that the instrument is not a promise to pay money, but a promise to make a gift, and that an action thereon can not be maintained.

Held, also, that it is not so ambiguous as to depend for its construction upon extrinsic facts.

PLEADING.—*Complaint.*—*Written Instrument.*—*Cause of Action.*—*Practice.*—Where a complaint professes to be founded upon a written instrument, and to rely on it as the cause of action, the plaintiff can not ask that it be held sufficient as setting forth some other right of action.

SAME.—*Demurrer.*—A demurrer admits only such allegations of a pleading as are properly and sufficiently pleaded.

From the Montgomery Circuit Court.

M. D. White, G. W. Paul and J. E. Humphries, for appellant.

A. D. Thomas, for appellee.

ELLIOTT, J.—The instrument upon which the appellant's complaint is founded reads thus:

85	503
128	546

85	503
150	308

85	503
1169	641

Johnston v. Griest.

“ January 1st, 1876.

“ This will certify that I do give to Charles E. Johnston \$100, the money to be paid as soon as my financial condition will allow ; and if I do not live to pay it, I wish it paid out of my estate.” (Signed) “ EDWARD F. GRIEST.”

The questions presented are these :

First. Is the instrument a promise to pay money, or is it a promise to make a gift ?

Second. Is it so ambiguous as to make its construction depend upon extrinsic facts ?

Of these in their order.

If the words “ I do give ” are not qualified by other words, then, plainly enough, the instrument is a mere promise to make a gift, and not a contract to pay money. But there are words which can not be passed unnoticed. The words “ pay ” and “ paid,” as used in the writing, are supposed to control the expression “ I do give,” and show that something more than a mere promise to make a gift was intended. The word “ give ” does not always signify a mere gratuitous act ; at all events it is not one of those words which have a fixed and unalterable meaning. In business affairs we frequently find embodied in propositions from one contracting party to another such expressions as “ I will give you such a price for such an article,” or “ I will give you so much rent for such a parcel of land ; ” in these cases, and very many like them, no one would take the meaning of “ give ” to be that the person making the proposal meant to do what he proposed out of mere generosity. But while the word “ give ” does not invariably indicate an intention to make a gift, the usual meaning unquestionably is to grant the thing specified as an act of generosity. We do not think the words “ pay ” and “ paid ” control the word “ give,” and divest it of its ordinary signification ; they are, as it seems to us, to be understood as directing in what manner the gift shall be executed.

The case can not be distinguished from that of *Harmon v. James*, 7 Ind. 263. In that case the instrument read as follows :

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"May 14th, 1836. This is to show that I allow to give Willet James two hundred and fifty dollars, to be paid in two years after date, as witness my hand and seal." And it was held that it was not a promise to pay money. The principle upon which the case proceeds is, that there is no undertaking to pay, and consequently no obligation created. This is sound doctrine. *Baird v. Thayer*, 8 Blackf. 146; *Ephraims v. Murdock*, 7 Blackf. 10. This last case has, we are aware, been overruled upon one point, but not upon the point here involved.

The cases of *Veasey v. Reeves*, 6 Ind. 406, and *Lewis v. Tipton*, 10 Ohio St. 88, are not in point, for the instrument sued on in those cases contained, what that sued on in this case lacks, a promise to pay money. It is just this want of an undertaking to pay money that renders the instrument in suit unavailable as a cause of action.

We come to the second of the questions stated. There are cases where an instrument is so ambiguous that it can not be construed without the aid of extrinsic facts; but the one under examination does not belong to that class. No mere process of construction can make it a promise to pay money. In order to give it this effect it would be necessary to thrust into it words which the parties did not write there; and this, it is well settled, can not be done except in cases of accident, fraud or mistake, and there is here no pretence of anything of that nature. It is, however, unnecessary to discuss this branch of the case, for the decision in *Harmon v. James* is fully and broadly against the appellant.

It is contended by the counsel that, aside from the instrument set out in each paragraph of the complaint, there are facts constituting a cause of action, and that, for this reason, the court erred in the ruling upon the demurrer. This position is untenable. It is too evident for controversy that the pleading is founded on the written instrument, and all else is mere auxiliary matter, explanatory of its meaning and effect. The theory is that the written instrument constitutes

Johnston v. Griest.

a cause of action, and to this theory the appellant must be held; for a plaintiff can not declare on one theory and recover upon another. *Johnston, etc., Co. v. Bartley*, 81 Ind. 406; *Judy v. Gilbert*, 77 Ind. 96 (40 Am. R. 289); *Lockwood v. Quackenbush*, 83 N. Y. 607; *Salisbury v. Howe*, 87 N. Y. 128. Where a complaint professes to be founded on a written instrument and to rely on the instrument as the cause of action, the party can not ask that it may be held sufficient as setting forth some other right of action.

Pleadings are to be construed according to their general scope and meaning, and not from detached and separate parts wrenched from their connection with the main body of the pleader's averments. Where it is evident from the general scope of the pleading, that it was intended to rest solely upon a written instrument, the pleader can not, upon discovering its insufficiency as a complaint of that character, change front and assert it to be sufficient for an altogether different purpose and upon a cause of action of an essentially different nature. *Trippe v. Hunccheon*, 82 Ind. 307; *Neidefer v. Chastain*, 71 Ind. 363 (36 Am. R. 198); *Richardson v. Snider*, 72 Ind. 425 (37 Am. R. 168); *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Kimble v. Christie*, 55 Ind. 140.

The appellee mistakes the rule. A demurrer does not admit all the allegations of a pleading; it admits only such as are properly and sufficiently pleaded. *Peyton v. Kruger*, 77 Ind. 486; *Worley v. Moore*, 77 Ind. 567. In this case the demurrer admits only such allegations as are relevant to, and fairly connected with, the gravamen of the action; and that is, in reality, the written instrument.

Judgment affirmed.

Pemberton *et al.* v. The State.

No. 10,648.

PEMBERTON ET AL. v. THE STATE.

85	507
171	6

CRIMINAL LAW.—Practice.—Motion for New Trial.—The refusal of the court, in a criminal trial, to permit a witness to answer a question, presents no question on appeal, unless specified as a cause in the motion for a new trial.

SAME.—Assignment of Error.—It is not proper in a criminal (as well as civil) case, to assign error upon a cause for a new trial.

SAME.—Indictment for Exhibiting Gambling Device.—An indictment for exhibiting “a certain gambling device” need not give the particular name of the device.

From the Grant Circuit Court.

J. A. Kersey and *L. D. Baldwin*, for appellants.

F. T. Hord, Attorney General, *C. W. Watkins*, Prosecuting Attorney, *W. B. Hord* and *W. VanDevanter*, for the State.

WOODS, C. J.—The appellants were convicted upon a charge of having unlawfully exhibited, to persons named, “for gain and to win money a certain gambling device,” the name of which was to the grand jurors unknown.

Error is assigned upon the overruling of motions to quash and in arrest of judgment, and upon the exclusion of an answer to a question propounded in cross-examination to one of the witnesses for the State.

The last assignment presents no question. It should have been upon the overruling of the motion for a new trial. The cases are too numerous for citation, which hold that error assigned upon the overruling of a motion for a new trial brings in review all causes stated in the motion, if in other respects the proper steps have been taken, and that it is not proper to assign error upon a cause for new trial.

The objection made to the indictment is, that it does not state that the name of the device could not be ascertained, and that the device is not described, and no excuse stated for not describing it. We deem the excuse for not giving, in the in-

Ricketts v. Richardson et al.

dictment, the name of the device sufficiently stated. *Brooster v. State*, 15 Ind. 190; *Moore v. State*, 65 Ind. 213.

We do not consider that it was necessary that a description of the particular device should have been given. The identity of the transaction was sufficiently determined by the alleged time and place and persons to whom the exhibition was made. If it was necessary to have given a description of the device, corresponding proof was also necessary; and so the question of the guilt or innocence of the appellants would have been made to turn, not upon the fact of guilt within the law defining the offence, but upon the accuracy of the indictment in reference to unimportant incidents. We can not sanction such a rule of practice.

Judgment affirmed.

No. 9810.

RICKETTS v. RICHARDSON ET AL.

LANDLORD AND TENANT.—*Lease.*—*Notice to Quit.*—Under a lease of buildings, at a specified rental, to be paid on a day certain, and of farming lands, to be paid for by a share of the crops, there being a failure to pay the rental for the buildings at the time fixed, which was before the maturity of the crops, the entire tenancy can not be terminated by a ten days' notice.

SAME.—*Forfeiture.*—A covenant by a tenant to keep down the briars, weeds and sprouts in the fence corners, does not give liberty to postpone its performance until the end of the term; but a breach would not enable the landlord to end the tenancy by a ten days' notice.

SUPREME COURT.—*Instructions.*—*Evidence.*—An instruction to the jury to find for a defendant can not be deemed erroneous by the Supreme Court, where the record does not contain any of the evidence.

From the Ripley Circuit Court.

J. B. Coles, for appellant.

J. S. Jelley, for appellees.

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BICKNELL, C. C.—The complaint in this case stated that the appellant made a written lease of certain lands to the appellees Richardson and Conner; that they failed to pay the rent and failed to comply with other stipulations of the lease, and had put the appellee Cochran in possession of part of the premises; that defendants had been duly notified to quit and deliver up the premises in ten days, which had expired before suit was brought. The complaint demanded possession of the premises and \$100 damages. The defendants answered by a general denial. The cause was tried by a jury, who returned a verdict for the defendants. The plaintiff moved for a new trial "because the court erred in giving to the jury, of its own motion, instructions numbered 3, 9 and 14, and each of them."

This motion was overruled, judgment was rendered on the verdict, and the plaintiff appealed. The only error assigned is overruling the motion for a new trial.

The following are the instructions objected to:

"3. The notice having been given to give up the entire premises, including said house, and the defendants not having agreed to pay for the use of said land a money rent, but a part of the crop when raised and matured, the service of said notice did not give said plaintiff a right to the possession of said premises at the end of ten days after service of said notice, or any time thereafter, because of the failure to pay said rent for said house. Therefore, when suit was commenced, the plaintiff was not entitled to the possession of said leasehold.

"9. Under the contract the defendants had during the existence of said lease, that is, until March 1st, 1881, to clean out the fence corners; therefore, as to this, the action was prematurely brought.

"14. All that I have heretofore said applies to the case as to the plaintiff and the defendants Conner and Richardson. In no event will you find against the defendant Cochran."

The bill of exceptions does not contain or purport to contain any of the evidence except the lease and the notice to

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quit. In the absence of any evidence as to Cochran, the 14th instruction was right.

The lease was as follows :

“ The said Conner and Richardson agree to raise a crop of corn consisting of thirty-six acres, and six acres of potatoes (each party furnishing half the seed), on the farm of Ricketts. The land to be cultivated by the said Conner and Richardson is situated on the ridge between the dwelling-house that Ricketts occupies and the one he used to live in, except the grass land on said ridge. The crop must be planted in good time and in good order, and saved in proper time and condition, and one-half that is raised is to be delivered at Rising Sun for Ricketts. All weeds and grass and sprouts and briars must be kept down during the season. The said Conner and Richardson are to have the use of the house and garden that Anderson occupies, until the first day of March, 1881, and also the barn, except the granary, for the same time ; and for the use of said house, garden and barn, the said Conner and Richardson agree to pay, on the first day of September, 1880, \$25. Six acres on the northeast corner of the farm is to be sown in oats, each party furnishing half the seed, and the oats divided equally and the straw pressed and delivered one-half at Rising Sun for Ricketts. The grass is to be cut in good time and order, and pressed and delivered, one-half of it, at Rising Sun, for Ricketts, Ricketts paying for the use of the press. The said Conner and Richardson have the privilege of turning their work horses and milch cows on the blue-grass pasture between March 1st, 1880, and November 1st, 1880 ; the firewood must be taken in the blue-grass pasture, between the gate on the branch and the sycamore log across it above said gate, and out of timber that is not fit for rails or house logs. The said Conner and Richardson agree to haul and spread on the ground all the manure that is or may be at the different places on the farm in the spring. If their horses and cattle are roguish or get into the fields that are cultivated on either side of the branch, then they are to confine them or repair the fence.

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The briars and weeds and sprouts are to be kept down in the fence corners, the same as in the fields.

[Signed]

“JOSEPH P. RICHARDSON.

“SANFORD R. CONNER.

“JAMES C. RICKETTS.”

The notice to quit was as follows :

“NOTICE.—Sanford Conner, Joseph P. Richardson and Benjamin Cochran, you are hereby notified to deliver up to me, at the expiration of ten days from the time of receiving this notice, the possession of the following premises: That part of the northeast and southeast quarters of section nineteen, township three, of range one west, in Ohio county, which you cultivated in corn, wheat, barley, oats and potatoes; and also the dwelling-house and barn on said southeast quarter of said section nineteen as aforesaid (the foregoing described land and property is now held of me by you as tenants) unless the rent due for said premises is paid within that time.

(Signed) “JAMES C. RICKETTS.”

This notice appears in the bill of exceptions as a part of the plaintiff's complaint. The complaint avers that it was served on the 4th day of November, 1880; but this averment is denied by the answer, and there is nothing in the record which shows how or when or by whom the said notice was served.

The third instruction of the court was, substantially, that upon such a contract such a notice to quit would not determine the tenants' right to the entire premises. The language is that such a notice did not give “the plaintiff a right to the possession of said leasehold.” This was strictly true; these proceedings are in the nature of forfeitures. If land be leased for cultivation, and a house with it, in the same contract, and the land is to be paid for by half the crop, and the house to be paid for by \$25, payable six months before the expiration of the lease, the non-payment of the \$25 will not authorize the landlord to determine the entire lease by a ten days' notice to quit.

 Buck et al. v. Axt.

The appellant claims that he was entitled to recover possession at least of the house, garden and barn. Instruction No. 3 makes no statement as to that, and the appellant asked for no instruction to that effect. The instruction given being right upon the proposition it embraced, if the appellant desired a special instruction as to the house, garden and barn, he should have demanded it. *White v. Beem*, 80 Ind. 239; *Reissner v. Oxley*, 80 Ind. 580; *Adams v. Stringer*, 78 Ind. 175.

The ninth instruction was erroneous; the meaning of the contract is, that the weeds, etc., in the fence corners are to be kept down the same as in the fields, that is, during the term; but the breach of such a stipulation would not authorize the landlord to determine the tenancy by a ten days' notice to quit, and there being no right to recover the possession of the leased land, there could be no damages for withholding the possession. The error, therefore, in the ninth instruction was a harmless error, and will not warrant the reversal of the judgment.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

85	513
128	57

 No. 9336.

BUCK ET AL. v. AXT.

MORTGAGE.—*Foreclosure of, Securing More than One Note.*—*Complaint.*—In an action to foreclose, it is proper to embrace in a single paragraph of complaint the mortgage and all the notes secured by it, and if a copy of one note only be given, the complaint may nevertheless be good upon demurrer.

SAME.—*Husband and Wife.*—*Duress.*—In an action to foreclose a mortgage against a husband and wife, it is not a good plea of duress by the wife, that she was induced to sign the mortgage by the threats of the mortgagee to pursue legal remedies against the husband (to collect the debt secured by the mortgage), and to sell them out of house and home.

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SAME. — Consideration.—Pre-existing Debt.—A mortgage to secure a pre-existing debt rests upon a sufficient consideration, both as to the debtor and as to his wife or any other who may have joined in making the mortgage.

SAME.—Description.—Auditor's Sale.—A description of land in a school fund mortgage as "the northeast part" of a specified tract, "containing ninety acres," is insufficient, and an auditor's sale made thereunder is invalid.

From the Lawrence Circuit Court.

J. W. Buskirk, H. C. Duncan, J. H. Loudon and R. W. Miers,
for appellants.

W. R. Harrison and W. E. McCord, for appellee.

WOODS, C. J.—Action by appellee against the appellants, upon three promissory notes, and a mortgage made to secure their payment, and to set aside a sale of a part of the mortgaged premises theretofore made by the county auditor on a school fund mortgage.

The appellants assume that the complaint consists of three paragraphs, and claim that each paragraph is insufficient, because a copy of the note on which it is founded is not made a part of it.

We regard the complaint as containing but a single paragraph, and as the action is to foreclose the mortgage, it was proper to embrace the mortgage, and as many notes as there were secured by it, in a single paragraph. The notes all together evidence the mortgage debt, and when, in addition to a judgment for the debt, a foreclosure of the mortgage is also sought, the facts may be alleged in a single paragraph, which are necessary to complete relief. See *Collins v. Frost*, 54 Ind. 242.

The complaint in this cause contains three clauses, commencing as follows:

"1. Plaintiff Axt complains," etc. "2. That on," etc. "3. That on," etc.; each proceeding with allegations showing the execution of a promissory note which is described and shown to be due, and of which a copy is alleged to be

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filed. Following these clauses are averments showing the execution of a mortgage "to secure the payment of said notes," and the facts on which the alleged invalidity of the auditor's sale is predicated; all followed with a prayer for the recovery of the amount due on the note, foreclosure of the mortgage, etc. There is given a copy of the mortgage and of a note corresponding with the one first described; but, instead of the other notes, the following statements: "2d. Note same as above, payable in two yrs." "3d. Note same as above, payable in three yrs."

While we regard the complaint as consisting of a single paragraph, it is good only in respect to the first note of which a copy is given. *Johnson School Tp. v. Citizens Bank, etc.*, 81 Ind. 515. But, being good in this particular, the pleading was not subject to demurrer.

The appellant Mrs. Buck, who, it is alleged, joined her husband in the execution of the mortgage in suit, filed two special pleas, to which the court sustained demurrers, and these rulings are assigned and insisted upon as error.

In the first of these pleas it is alleged that her signature was obtained by fraud and duress in this, that her husband was largely involved, and consented to an arbitration with his creditors, or some of them; that the arbitrators concluded that her husband owed the mortgagee Frazier \$1,250, and directed that he execute his notes and mortgage, his wife joining, to secure the payment of the debt; that she refused to sign the mortgage, whereupon one Bennett, who had first requested her signature, came to her a second time and told her that she must sign, that he was the attorney and agent of Frazier, and they did not intend to wait any longer; that she had to sign right then; that if she did not sign, she would see that they would sell her out of house and home, and Frazier would prosecute her at once; and being so restrained, harassed and influenced, she did sign the mortgage, though protesting at the time against the unlawful means used against her.

The threats alleged were not such as to constitute duress. The evident meaning of the threats used was that Frazier would at once seek his legal remedies against her and her husband, and so sell them out of house and home; and if more than this was meant, the facts should have been alleged to show it. See *Richardson v. Hittle*, 31 Ind. 119; *Peckham v. Hendren*, 76 Ind. 47; *Reynolds v. Copeland*, 71 Ind. 422; *Line v. Blizzard*, 70 Ind. 23.

The second plea is to the effect that the notes and mortgage were made for the individual debt of her husband; that the notes were made on the 12th day of October, 1877, and that the mortgage was not executed by her until the 1st day of November, 1877, and that there was no consideration for the execution thereof by her.

It may be observed, though it is perhaps not material, that it is not alleged when her husband executed the mortgage. A mortgage to secure a pre-existing debt rests upon a sufficient consideration, not only in respect to the debtor, but his wife or any other who may join in its execution. See *Hubble v. Wright*, 23 Ind. 322; *Ellis v. Kenyon*, 25 Ind. 134; *Philbrooks v. McEwen*, 29 Ind. 347.

The remaining question is whether the court erred in sustaining a demurrer for want of facts to the cross complaint of the appellants Loudon and Miers, who were the purchasers at the alleged invalid sale made by the auditor, under the school fund mortgage. The exact question presented is whether the description of the land contained in the mortgage by which the sale was made is so uncertain as to render the mortgage, and the sale by virtue of it, void. The following is the description: "The northeast part of the southwest quarter of section 5," etc., "containing ninety acres."

Allowing that the statement of the number of acres constitutes a part of the description, it is still clear that the location and boundaries of the land can not be determined, and, while it may be that, as between the parties and those having notice when they acquired any interest in the land, the school

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fund mortgage might be corrected, on a showing of what land was mutually intended to have been described, the court did not err in holding that the sale made by the description given was a nullity.

The right of the State to have its mortgage corrected the appellee conceded, and brought the amount due thereon into court, making it clear that the appellants have no standing upon which to predicate a claim for more.

Judgment affirmed.

No. 10,547.

85 516
126 589

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. COYLE.

SUPREME COURT.—*Amount in Controversy.*—*Jurisdiction.*—To give the Supreme Court jurisdiction in cases originating before justices of the peace, the amount in controversy, exclusive of interest and costs, must exceed fifty dollars; and when the plaintiff recovers that sum or is satisfied with the amount recovered, and the defendant is merely resisting the recovery, claiming no set-off or counter-claim, the amount so recovered is all that is in controversy within the meaning of section 632, R. S. 1881.

From the Montgomery Circuit Court.

A. D. Thomas, for appellant.

E. C. Snyder, for appellee.

ELLIOTT, J.—The appellee's motion to dismiss the appeal must be sustained.

The action originated before a justice of the peace; the appellee's judgment, exclusive of interest, is for \$50, and she is content with her judgment. The adjudged cases settle these propositions:

1st. Where the plaintiff recovers \$50, or less, and is satisfied with the amount of the recovery, and the defendant is

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merely resisting the recovery, and is claiming no set-off or counter-claim, then the amount so recovered is all that is in controversy. *Sprinkle v. Toney*, 73 Ind. 592; *Parsley v. Eskew*, 73 Ind. 558; *Pennsylvania Co. v. Trimble*, 75 Ind. 378.

2d. In order to give this court jurisdiction in cases originating before justices of the peace, the amount in controversy, exclusive of interest and costs, must exceed \$50. *Wagner v. Kastner*, 79 Ind. 162; *Breidert v. Krueger*, 76 Ind. 55; *Halleck v. Weller*, 72 Ind. 342.

It is very obvious that what is said in *Breidert v. Krueger*, *supra*, as to the statement in the body of the complaint controlling instead of the sum laid in the conclusion, has not the remotest application to such a case as the present.

Appeal dismissed.

 No. 8943.

FLANNAGAN v. DONALDSON ET AL.

85	517
145	622

ATTACHMENT.—*Fraudulent Sale of Property.—Evidence.*—Where the plaintiff in an action sues out an order of attachment against the property of the defendant, upon the ground that he has sold, conveyed or otherwise disposed of certain described property, with the fraudulent intent, etc., evidence showing the specific sale, with the alleged intent, will sustain the attachment proceeding, and, in such case, it is not incumbent on the plaintiff to prove, also, the negative fact that after such sale or conveyance, with such intent, the defendant did not have enough property left to pay his debts.

From the Superior Court of Cass County.

D. B. McConnell, for appellant.

M. Winfield and *Q. A. Myers*, for appellees.

Howk, J.—In this action the appellant sued the appellees upon the transcript of a judgment which he had recovered against the appellants Richard W. Donaldson and Margaret

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Donaldson, in the Cass Circuit Court. With his complaint the appellant filed an affidavit for an order of attachment, and for a summons in garnishment for the appellees Isaac M. Donaldson and David and Amos Keepert. The cause was put at issue, both as to the appellant's complaint and as to his affidavit in attachment. The issues joined were tried by a jury, and a general verdict was returned, in substance as follows: "We, the jury, find for the plaintiff as against the defendants Richard W. and Margaret Donaldson, and we assess the plaintiff's damages at \$466.93; and we find for the defendants upon the plaintiff's attachment proceedings." Over the appellant's motion for a new trial, and his exception saved, the court rendered judgment on the verdict in his favor for the amount found as his damages, and against him and in appellees' favor for the costs upon his attachment proceedings.

In this court all the questions presented and discussed by appellant's counsel, in his exhaustive brief of the case, arise under the alleged error of the trial court, in overruling the motion for a new trial. These questions relate exclusively to so much of the general verdict as found for the appellees upon the issue joined, by their answer in denial, upon the appellant's affidavit for an attachment and for process in garnishment, and to the judgment rendered thereon. The grounds for the attachment proceedings were stated in the appellant's affidavit, in substance as follows: "The said Flannagan further swears that the said Margaret Donaldson has sold, conveyed and otherwise disposed of her certain real estate to her son Isaac M. Donaldson, he, the said Isaac M., colluding with the said Margaret Donaldson, with the fraudulent intent to cheat, hinder and delay her creditors, which said real estate, so sold as aforesaid, was as follows, to wit: A lease upon a limekiln and dwelling-house adjacent, together with the premises appurtenant, situate in section 26, township 27 north, of range 2 east, in Cass county, Indiana. The said Flannagan says further, on his oath, that the said Isaac M. Donaldson, after the said fraudulent conveyance of said real estate to him

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by Margaret Donaldson, held the same as her trustee, and, in that capacity, sold said real estate to Daniel Keepert and Amos B. Keepert, and, in payment therefor, received their promissory notes payable to himself, which, plaintiff avers, were made so payable to him for the benefit of the said Margaret Donaldson; and the said Isaac M. Donaldson is made a party defendant to answer as to his interest herein as such trustee, and to answer as garnishee defendant as to the amount of such indebtedness to the said Margaret Donaldson."

It is earnestly insisted by the appellant's counsel, that the general verdict of the jury, finding for the appellees upon the attachment proceedings, was not sustained by sufficient evidence. If we were authorized to consider and decide this question upon what we might regard as the fair preponderance of the evidence, as the same appears in the record, it would seem to us that the counsel was right in this position, that the general verdict upon the attachment proceedings was not sustained by sufficient evidence, and that, for this cause, a new trial ought to have been granted. While this is so, however, it must be conceded that there is evidence in the record tending to sustain that part of the general verdict, and to show that the said Margaret Donaldson had not sold, conveyed, or otherwise disposed of her said real property to her son Isaac M. Donaldson with a fraudulent intent, stated in appellant's affidavit. In such cases it must be regarded as settled, that this court will not weigh the evidence, nor attempt to determine its preponderance, nor disturb the verdict of the jury, or the finding of the trial court, upon what might appear, from the mere reading of the evidence, to be its fair, clear, or even overwhelming preponderance. *Cox v. State*, 49 Ind. 568; *Rudolph v. Lane*, 57 Ind. 115; *Swales v. Southard*, 64 Ind. 557; *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Hayden v. Cretcher*, 75 Ind. 108.

The court, of its own motion, instructed the jury trying the cause, as follows: "To authorize a finding for the plaintiff upon the attachment proceedings, the plaintiff must prove, by

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the preponderance of evidence, one at least of the causes of attachment set out in his affidavit. The plaintiff has introduced evidence tending to show that the defendant Margaret Donaldson conveyed to her son Isaac a certain limekiln lease. This, of itself, would not be sufficient to show fraud. To make said conveyance fraudulent as to creditors it must further appear that Margaret, after making said conveyance, did not still have a sufficient amount of property, subject to execution, to pay her debts." After setting out this instruction, the bill of exceptions proceeds as follows: "Here one of the jurors, upon the court signifying that he might do so, asked the following question: 'Must the plaintiff prove that she (meaning defendant Margaret Donaldson) did not retain sufficient property to pay her debts?' To which the court answered: 'Yes; the plaintiff must prove that she did not, after making conveyance to her son Isaac, retain sufficient property to pay her debts, or he can not recover upon his attachment.'" The bill of exceptions then shows, that the court gave the above instruction, with others, "but gave no other instruction modifying, limiting or explaining that part of the instructions which is set out herein. To the giving of which instruction above copied in this bill of exceptions, the plaintiff at the time excepted."

We are of the opinion that the court clearly erred in giving the jury the instruction quoted. It does not contain a correct statement of the law, applicable to the matters in issue on the affidavit in attachment, or to the evidence adduced upon the trial. The ground for an attachment, stated in the appellant's affidavit, was the one provided for in the *fifth* clause of section 156 of the code of 1852. In this clause and section it is provided that the plaintiff, in an action for the recovery of money, at the commencement of his action, or at any time afterwards, may have an attachment against the property of the defendant, where such defendant "has sold, conveyed or otherwise disposed of his property subject to execution, or suffered or permitted it to be sold with the fraudulent intent

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to cheat, hinder, or delay his creditors." 2 R. S. 1876, pp. 98, 99; Civil Code of 1881, section 197; and section 913, R. S. 1881. It is manifest that, under this statutory provision, it was not incumbent on the appellant to show, by his affidavit for an attachment, that the appellee Margaret Donaldson, after her alleged fraudulent sale and conveyance of her property to her son Isaac, did not retain or have left sufficient property to pay her debts. The appellant's affidavit stated the ground for an attachment upon which he relied, substantially in the language of the statute, and the affidavit was sufficient. If the statement in his affidavit was sustained by a fair preponderance of the evidence, he was entitled to a recovery in his attachment proceeding; and it was error on the part of the court to instruct the jury, in effect, that if he had not proved that Margaret Donaldson did not, after making the conveyance to her son Isaac, retain sufficient property to pay her debts, he could not recover upon his attachment. This negative fact, the proof of which by the appellant the court told the jury was indispensable to his recovery upon his attachment, was entirely outside of the issues in the cause and of the requirements of the statute, and it was not and is not the law, that the appellant was bound to prove such fact to entitle him to a recovery in his attachment proceedings.

If it were the fact, that, after making the conveyance to her son Isaac, the said Margaret Donaldson did retain or have left sufficient other property to pay her debts, such fact might possibly have been given in evidence by her, as tending to prove that her conveyance was not fraudulent. But, certainly, it was not necessary that the appellant should negative such fact by his evidence, in order to maintain his attachment proceedings. In this respect, the case at bar must not be confounded, as seems to have been done by the trial court, with the ordinary cases, where suits are brought to set aside conveyances as fraudulent against the grantor's creditors, and to subject the property conveyed to the payment of the grantor's debts. In such cases, it is well settled that the rule in re-

Stockwell v. The State.

gard to what the plaintiff must allege and prove is widely different from the rule declared in this case. *Pfeifer v. Snyder*, 72 Ind. 78.

The appellant's counsel also complains in argument of the refusal of the trial court to give the jury certain instructions at his request. But we deem it unnecessary for us to set out or comment upon these instructions in this opinion; especially so, as the error of the court, in the instruction given of its own motion, will require the reversal of the judgment below and a new trial of the cause.

The appellant's motion for a new trial ought to have been sustained.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the November term, 1882.

No. 10,623.

STOCKWELL v. THE STATE.

INTOXICATING LIQUOR.—Sale Without License.—Indictment.—An indictment for selling intoxicating liquor without license "to be drunk and suffered to be drunk in the defendant's house, out-house, yard and garden," is good on motion to quash; charging thus in the conjunctive it merely avers more than is necessary to make an offence, under section 5320, R. S. 1881.

SAME.—Evidence.—Appurtenances.—A platform and steps annexed to a room are appurtenances thereof, within the meaning of section 5320, R. S. 1881.

From the Monroe Circuit Court.

J. W. Buskirk, for appellant.

F. T. Hord, Attorney General, *H. C. Duncan*, Prosecuting Attorney; and *W. B. Hord*, for the State.

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NIBLACK, J.—This was a prosecution for unlawfully selling intoxicating liquor. The substantial part of the indictment was as follows:

“The grand jury of Monroe county, in the State of Indiana, * * * * * on their oath present that one John Stockwell, late of said county, on the 11th day of September, A. D. 1882, in said county, and State, * * did then and there unlawfully sell to one James M. May intoxicating liquor, to be then and there drunk and suffered to be drunk in the house, out-house, yard and garden of the said John Stockwell, situate in the said county, and in the appurtenances then and there and thereunto belonging, where the same was sold, to wit, one quart of beer at and for the price of fifteen cents, he, the said John Stockwell, not then and there having a license to sell such intoxicating liquor to be drunk, or suffered to be drunk, in the said house, out-house, yard or garden, or in said appurtenances thereunto belonging.”

Before pleading to the accusation against him, the defendant moved to quash the indictment, but his motion was overruled. The court thereupon found the defendant guilty as charged, and assessed and adjudged a fine against him.

Error is assigned upon the refusal to quash the indictment, and upon the overruling of a motion for a new trial, which was, at the proper time, interposed.

The appellant insists that the indictment was bad for uncertainty:

First. In averring that the intoxicating liquor was sold *to be drunk and suffered to be drunk* in certain places.

Second. In not alleging that the intoxicating liquor was sold to be drunk at some one of the places enumerated in it.

The phrases “to be drunk and suffered to be drunk,” contained in the first specification, and the words “house, out-house, yard and garden,” referred to in the second specification, having been conjunctively connected together, no uncertainty resulted from the use of those phrases and words. Being thus conjunctively connected, the only effect was that

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more was charged in the indictment than was necessary to make out an offence under the statute. R. S. 1881, sec. 5320. If these phrases and words had been disjunctively connected, a different question would have been presented. 1 Chit. Crim. Law, 231; 1 Bish. Crim. Proced., sec. 585. There was no error in overruling the motion to quash the indictment.

It was shown by the evidence that there was a platform in the rear of the room which constituted the appellant's place of business, and that there were some steps leading down to the ground from that platform.

May, the prosecuting witness, testified to having purchased a quart of beer of the appellant at the time and place and of the quality charged in the indictment; that the appellant gave him the beer in a quart measure, and two glasses to drink it with, and told him to go out the back way, off the premises; that he, witness, went out across the platform on to the steps, where he and another person drank the beer; that the appellant might have seen him drinking the beer by looking out of a back window, but that he, witness, could not say that the appellant did so, not knowing whether he did or not; that he had frequently bought beer of the appellant before, and had drunk it either on the platform or on the steps; that he, witness, had seen other persons purchase beer of the appellant and drink it at one or the other of those places.

It was also shown by the evidence that the appellant did not own the building in which the beer was sold, but simply occupied a part of it under a lease which only specifically embraced the room constituting his place of business and the cellar under it.

It is argued on behalf of the appellant, that, under such circumstances, he had no legal control over either the platform or the steps leading from it, and that, consequently, he was not responsible for the use which the prosecuting witness made of the steps after he, the appellant, sold him the beer.

The inference from the evidence inevitably was, that the platform and steps were appurtenances to the room in which

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the beer was sold, and it seems to us that the only question of any difficulty for the court to decide was, whether the beer was drunk upon the steps with the consent of the appellant. We think that the evidence tended to show that the platform and steps were used as drinking places with the consent of the appellant, and that, under all the circumstances disclosed by the evidence, the court was justified in coming to the conclusion that the prosecuting witness drank the beer on the steps with the assent of the appellant impliedly given.

We see no error in the refusal of the court to grant a new trial.

The judgment is affirmed, with costs.

No. 10,635.

DYER v. THE STATE.

CRIMINAL LAW.—*Affidavit and Information.—Variance.*—In a prosecution by affidavit and information for a misdemeanor, the information must be supported by an affidavit charging the same offence as that described in the information, and, therefore, where the affidavit upon which the information is based charges that the offence was committed on the 24th day of December, 1881, and the offence described in the information is alleged to have been committed on the 24th day of January, 1881, a motion to quash should be sustained.

SAME.—*Amendment.—Practice.*—An information, after a motion to quash has been made in the trial court, can not be amended in the Supreme Court.

SAME.—*Motion to Quash.*—It is not necessary, upon a motion to quash, to state to the trial court the specific objections to the affidavit and information.

From the Morgan Circuit Court.

G. A. Adams, L. Ferguson, J. S. Newby and H. A. Smock,
for appellant.

F. T. Hord, Attorney General, J. D. Alexander, Prosecut-
ing Attorney, W. R. Harrison and W. E. McCord, for the State.

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ELLIOTT, J.—The affidavit, upon which the information professes to be based, charges that the misdemeanor of which appellant was convicted was committed on the 24th day of December, 1881, and the offence described in the information is alleged to have been committed on the 24th day of January, 1881. The appellant contends that his motion to quash should have been sustained.

Informations must be supported by an affidavit and must charge the same offence as that described in the affidavit. An information charging a distinct and different offence from that stated in the affidavit can not be upheld.

It is difficult, if not impossible, to discover any ground upon which it can be held that an offence committed in January is the same as one committed in the following December. It would be a wide stretch of construction which would declare a misdemeanor perpetrated in December to be the same as one committed in the preceding January. The offence described in the information was committed, taking as true, as it is our duty to do, the statements of the information, eleven months prior to the one described in the affidavit. We are unable to perceive any reason which will justify us in treating the two offences as one. The question is not, however, barren of authority. *Williamson v. State*, 5 Texas App. 485, and *Hoerr v. State*, 4 Texas App. 75, are directly in point in favor of the appellant. In our own case of *Mount v. State*, 7 Ind. 654, it was said that the information must allege the same person and offence as the affidavit.

It is urged that no specific objection was pointed out to the court below by the motion to quash, and that the objections now made should not be entertained. This point is settled against the contention of the State. *Davis v. State*, 69 Ind. 130. It is not necessary that the motion to quash should specifically state the grounds of objection. It seems to us that the argument of the State upon this point is a forcible and sound one, but that it should be addressed to the Legislature rather than to the court; for if there is to be any

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change in the law it must be made by the law-making branch of the government. It is no doubt true that justice would be subserved by requiring the motion to quash to point out the specific grounds of objection, but it is for the Legislature, and not the courts, to add that requirement to the provisions of the statute.

The amendment of the information might have been made in the court below, but it can not be made on appeal. Where a motion to quash is interposed, there is no right to amend the information after the case gets into the appellate court. *Keiser v. State*, 78 Ind. 430.

Judgment reversed.

No. 9321.

SINCLAIR v. JOHNSON.

BILL OF EXCHANGE.—*Common Order.*—*Liability of Drawer.*—*Notice.*—An order by A. upon B. to pay money to C., without words of negotiability, is not an inland bill of exchange, but is classed with bank checks; and the drawer is entitled, as the drawer of a bank check, to notice of the failure of the drawee to pay upon presentation.

From the Warren Circuit Court.

M. M. Milford, H. Heffren and J. A. Zaring, for appellant.
J. M. Rabb, for appellee.

WOODS, J.—Action against the appellee by the appellant, as assignee of the following order, to wit:

“JOHNSONVILLE, July 18th, 1876.

“J. B. Wright: Please pay to D. L. Wright the sum of \$160, amount paid for mare to John Lucas.

(Signed)

“GEORGE W. JOHNSON.”

The complaint charges that the order was given in consideration of an indebtedness of the drawer to the payee, that

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the drawee refused to accept, of which the drawer was notified. The defendant, the appellee, answered that he was never notified of the refusal of the drawee to accept the order, and that he had, when it was drawn and presented, funds in the hands of the drawee to meet and pay it. The plaintiff replied with a general denial, and, upon a trial had, the court found for the defendant.

Error is assigned upon the overruling of the appellant's motion for a new trial, and for a judgment in his favor notwithstanding the verdict.

An order book entry shows that the plaintiff filed a motion for judgment, but, as the motion itself is not in the record, it can not be determined whether it was such as to present the question discussed in the briefs.

The causes stated in the motion for a new trial are: 1. The finding is not sustained by sufficient evidence; 2. The finding is contrary to law; and, 3. "The court erred in overruling the plaintiff's objection to a question asked the defendant, Johnson, on his examination as a witness herein on the trial hereof, which appears elsewhere in the record."

The last specification is too indefinite to present any question. At the time when the motion was passed upon and overruled, there was in fact nothing in the record to show more definitely what was referred to. A bill of exceptions was afterwards filed, which shows an exception to the admission of certain testimony by the witness named, but it is impossible to say that the motion for a new trial and the bill of exceptions referred, and were understood by the court to refer, to the same thing.

The order sued on has no words of negotiability, and can not be regarded as an inland bill of exchange, as counsel for the appellee claims it to be. The rights and liabilities of the parties are, therefore, not to be determined by the rules applicable to that class of instruments. Such orders seem to be classed with bank checks, and the liability of the drawer to be governed by the rules which are applied to the drawers of

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checks. Regular protest and notice, in the strict manner required in reference to bills of exchange, was not necessary, but, under the issue made in this case, it was necessary for the plaintiff to show the alleged presentment and the failure of the drawee to pay, and that he notified the defendant thereof. *Spangler v. McDaniel*, 3 Ind. 275; *Gallagher v. Raleigh*, 7 Ind. 1; *Blankenship v. Rogers*, 10 Ind. 333; *Griffin v. Kemp*, 46 Ind. 172; *Henshaw v. Root*, 60 Ind. 220; 2 Daniel Neg. Instr. (3d ed.), sections 1587-8.

The answer explicitly denies the notice alleged in the complaint, and the defendant testified as explicitly that he had never received notice of the failure or refusal of the drawee to pay, and that the drawee, at the date of the order, owed him the amount of it. Notwithstanding, therefore, the testimony of the appellant, that, within a day or two after the presentation of the order, he wrote and mailed a letter (of which the contents were not stated) to the appellee, we can not say that the finding was not right, on the ground that the evidence failed to show the requisite notice.

Judgment affirmed.

Opinion filed at the May term, 1882.

Petition for a rehearing overruled at the November term, 1882.

No. 9687.

DUNLAP v. WAGNER.

INTOXICATING LIQUOR.—*Unlawful Sale.*—*Injury in Consequence of Intoxication.*—*Proximate Cause.*—*Liability for Results.*—*Negligence.*—*Cases Criticised and Distinguished.*—An unlicensed liquor dealer furnished on Sunday intoxicating liquor to A. until he was helpless and unconscious, and in that condition placed him in his sleigh, to which was attached a quiet horse of the plaintiff which A. had in use. An accident, induced by the inability of A. to manage the horse, caused the latter to run away, whereby the horse was killed.

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Held, that the liquor seller was, by statute (R. S. 1881, sec. 5323), as well as at common law, liable for the value of the horse. *Krach v. Heilman*, 53 Ind. 517, *Collier v. Early*, 54 Ind. 559, and *Backes v. Dant*, 55 Ind. 181, criticised and distinguished.

From the Bartholomew Circuit Court.

G. W. Cooper and — *Burns*, for appellant.

N. R. Keyes, for appellee.

ELLIOTT, J.—The appellant was the owner of a gentle horse which he lent to Charles Dunlap, who hitched it, with another of like docile disposition, to a sleigh, and on Sunday, January 9th, 1878, drove to the appellee's place of business; the latter, although not licensed as a retail liquor seller, kept intoxicating liquors for sale, and at the time named did sell and give to Dunlap liquor in less quantities than a quart, and suffered him to drink it on his, appellee's, premises; the liquor so supplied Dunlap produced intoxication so great as to cause unconsciousness; while in this state, and incapable of controlling the horses, Dunlap was placed in the sleigh, and the horses started homeward by the appellee; because of the inability of Dunlap to manage the horses, an accident occurred which frightened them, and they ran away, and appellant's horse received such injuries as caused its death.

The appellee violated the law in selling liquor to Charles Dunlap, for the law prohibits the sale of liquor on Sunday, and also forbids its sale in less quantities than a quart by unlicensed dealers. He was, therefore, a wrong-doer, and wrong-doers are responsible for injuries proximately resulting from their wrongful acts. A man who, in violation of law makes another helplessly drunk, and then places him in a situation where his drunken condition is likely to bring harm to himself or injury to others, may well be deemed guilty of an actionable wrong independently of any statute. But we have a statute which provides that every person shall have a right of action for an injury resulting to person or property against one who shall, by selling intoxicating liquors to another, have

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caused the intoxication of the person by, or through whom, the injury is done. R. S. 1881, sec. 5323.

It is plain that a right of action exists against one who makes another drunk, for the recovery for such injuries as are done by the intoxicated person "on account," as the statutory phrase runs, "of the use of such intoxicating liquors."

The right of action exists only in cases where the injury is the natural and proximate result of the wrong done in making drunk the person by whom it is caused, and the material enquiry is, whether the injury of which this appellant complains was the proximate and natural result of the appellee's wrongful act.

It is to be observed that the fact that Charles Dunlap was placed in charge of the horses is conceded by the demurrer, and the case is, therefore, that of one placing a man whom he has made helplessly drunk in a situation where injury might result to the property in his possession because of his incapacity to manage and care for it. We assume that horses require the management of an intelligent person in reasonable control of his mental faculties and physical powers, and this we do for the reason that all persons are presumed to know the natural and ordinary propensities and dispositions of such animals. Wharton Neg., section 100; Shearman & Redf. Neg., section 188; *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166; S. C., 40 Am. R. 230. If, then, horses need the control of one in possession of his faculties, the man who deprives another of the possession of them, and puts him in control of such animals, does an act which is likely to result in injury.

It is true that the injury resulting from the wrong complained of must be such as might have been reasonably foreseen and provided against, but it is by no means necessary that the precise injury which actually resulted should have been foreseen; for it is sufficient if it was of such a general nature as was likely to result from the act of the wrong-doer. It is never essential that it should be made to appear that the precise injuries which did occur could have been foreseen; it

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is enough, as Mr. Thompson says, if they are "such as are usual, and as therefore might have been expected." 2 Thompson Neg. 1083, n.; *Billman v. Indianapolis, etc., R. R. Co., supra*; *Binford v. Johnston*, 82 Ind. 426. A late writer says: "If his" (the wrong-doer's) "act has a tendency to injure some person of the general public, or many persons, and finally does, in the manner which was beforehand probable, cause such injury, it is proximate." 1 Sutherland Damages, 28.

There are cases bearing upon the precise question before us and we turn to them. In one of our own cases, *Schlosser v. State, ex rel.*, 55 Ind. 82, a complaint, charging that the husband was made drunk and thereby caused to beat his wife and neglect to provide for her, was held good, and, in support of this ruling the cases of *Fountain v. Draper*, 49 Ind. 441, *Barnaby v. Wood*, 50 Ind. 405, and *English v. Beard*, 51 Ind. 489, were cited by the court. In the last of these cases it was held that the seller was liable to one who was assaulted and beaten by the intoxicated person. It needs no argument to show that the injury which this appellant suffered was much more direct and proximate than that sustained by the person upon whom the drunken man committed the assault and battery; for, that horses left free from control are more likely to run away and do mischief than a drunken man to commit a crime, is very evident. In *Mead v. Stratton*, 87 N. Y. 493 (41 Am. R. 386), the defendant was the keeper of a hotel; the deceased bought liquor, drank it, and became so much intoxicated that he was helped into his buggy; he fell from it on his way and was killed, and it was held that his widow might have her action. The action was held maintainable in a case where a son was made intoxicated and in this condition so drove his father's horse as to greatly injure it. *Bertholf v. O'Reilly*, 8 Hun, 16. This case was affirmed in *Bertholf v. O'Reilly*, 74 N. Y. 509 (30 Am. R. 322). A like principle was involved and decided in *Aldrich v. Sager*, 9 Hun, 537, where a son-in-law, wrongfully made drunk, so recklessly drove a team as to cause the wagon to which they were at-

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tached to be upset, and his mother-in-law, who was with him in the wagon, to be injured. The case of *Volans v. Owen*, 9 Hun, 558, is in principle the same as those cited. The Supreme Court of Ohio goes very far upon this question as is proved by the cases of *Duroy v. Blinn*, 11 Ohio St. 331, and *Mulford v. Clewell*, 21 Ohio St. 191. Damages may be recovered for property squandered or destroyed by the intoxicated man, according to the rule declared in Iowa and Michigan. *Woolheather v. Risley*, 38 Iowa, 468; *Hemmens v. Bentley*, 32 Mich. 89. In *King v. Haley*, 86 Ill. 106 (29 Am. R. 14), it was held that one who is injured by a pistol shot, fired by the man to whom the liquor was sold, may maintain an action under the statute, and a like holding was made in *Bodge v. Hughes*, 53 N. H. 614. The intoxicated man in the case of *Hackett v. Smelsley*, 77 Ill. 109, drove a horse and buggy into the Sangamon river, and the action was held maintainable. Expenses for nursing a person made sick by the intoxication are recoverable. *Wightman v. Devere*, 33 Wis. 570; *Peterson v. Knoble*, 35 Wis. 80.

Appellee relies upon the cases of *Krach v. Heilman*, 53 Ind. 517, *Collier v. Early*, 54 Ind. 559, and *Backes v. Dant*, 55 Ind. 181. In the last named case the facts were, that the husband, while intoxicated, fell down a flight of stairs and was killed, and it was held, solely upon the authority of the two cases first named, and without discussion or reference to any of our other cases, that the action would not lie. In the second of the cases named, the intoxicated man lay down upon a railroad track and was killed by a passing train; and the action was held not maintainable, and this case, like the other, rests entirely upon *Krach v. Heilman*, *supra*. It is difficult, if not impossible, to reconcile the doctrine of the case under immediate mention with the earlier cases of *Fountain v. Draper*, *supra*, *English v. Beard*, *supra*, and *Barnaby v. Wood*, *supra*, or the later one of *Schlosser v. State, ex rel.*, 55 Ind. 82. Nor has the doctrine anywhere found favor; on the contrary, it has been disapproved. Lawson Civil Rem-

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edy for Injuries from Sale of Intoxicating Liquors, 44; Monthly Jurist, May, 1877; *Mead v. Stratton*, 87 N. Y. 493. It is quite certain that it can not be harmonized with the uniform current of judicial decisions, and it is clear that the New England highway cases, upon which it is chiefly founded, can hardly be in point upon such a question, owing to the peculiarities of the statutes of the New England States; and it is likewise certain that two of the cases cited as authority are now everywhere recognized as unsound. Cooley Torts, 76 auth. in n.; *Fent v. Toledo, etc., R. W. Co.*, 59 Ill. 349; S. C., 14 Am. R. 13; *Billman v. Indianapolis, etc., R. R. Co., supra*. It is obvious that the doctrine of *Kräch v. Heilman, supra*, ought not to be extended, and extended it must be, or it can not embrace this case, for here there is an important element which was absent from that case, and that element is the direct and immediate act of the appellee in placing the drunken man in charge of appellant's property, knowing his incapacity to control or care for it. There is here the direct connection with the cause which led to the injury sustained by the appellant. If to the case of *Collier v. Early, supra*, were added the element that the seller of the liquor led the drunken man upon the track and there left him in an unconscious state, exposed to the probable danger of death from passing trains, it would make it such a case as that now at our bar. It is this important element that distinguishes the present case from the cases relied on, and makes their doctrine wholly inapplicable.

It is argued by appellee's counsel, that there was an intervening agency between his client's wrong and the appellant's injury. We think the assumption an undue one, for there was, as we understand the facts, no intervening agency; but if it were granted that the assumption is a just one, the conclusion deduced by counsel is incorrect. An intervening agency does not absolve the wrong-doer. In concluding a long and careful review of the authorities in *Weick v. Lander*, 75 Ill. 93, the Supreme Court of Illinois said: "The principle announced is, that whoever does an unlawful act is to be re-

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garded as the doer of all that follows." The general principle which controls upon this point is declared in our own cases of *Billman v. Indianapolis, etc., R. R. Co., supra*, and *Binford v. Johnston, supra*.

Judgment reversed.

No. 9996.

McWHINNEY v. BRIGGS.

SUPERIOR COURT.—*Appeal.—Transcript.*—Where a Superior Court in general term reverses a judgment at special term, an appeal from the judgment of reversal to the Supreme Court will present no question when the transcript is so made up that it does not show the errors found by the general term, nor the directions given to the special term.

From the Superior Court of Marion County.

J. T. Lecklider, for appellant.

D. V. Burns and *C. S. Denny*, for appellee.

FRANKLIN, C.—Appellant sued appellee, in the Marion Superior Court, to quiet the title to, and recover the possession of, certain real estate claimed by appellant by virtue of a tax title. The defendant was a non-resident minor; service was had by publication; a guardian *ad litem* was appointed; upon issue formed upon the guardian's answer, a trial was had before the court, and a finding for the plaintiff that his tax title was invalid, but that the plaintiff was entitled to recover all the taxes he had paid, charges and interest, and that they should be declared a first lien upon the real estate for their payment; and, over a motion by the guardian *ad litem* for a new trial, judgment was rendered for the plaintiff for the sum of \$622.33, and that the same be declared a lien upon the said real estate, that the equity of redemption in and to said real estate be foreclosed, and that said lands be sold for the payment thereof. On the 3d day of March, 1881, on motion of defend-

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ant, a new trial as a matter of right, under the statute, was granted, defendant having paid all the costs. Whereupon the guardian *ad litem* filed an amended answer in two paragraphs. A demurrer was overruled to the second paragraph of the answer, and a reply in denial filed. The cause was again submitted to the court for trial, and on the 28th day of November, 1881, the court again found for the plaintiff in a similar way to former finding, adding in the interest, charges, etc., and, over a motion for a new trial, rendered judgment for \$715.84, declared a lien therefor, foreclosed the equity of redemption, and decreed the land to be sold. The plaintiff moved the court to change and modify the judgment and decree, which was overruled. The defendant excepted to the judgment and decree and appealed to the general term of the superior court, each party filing a bill of exceptions. The defendant, in the general term, assigned as error the overruling of his motion for a new trial; and the plaintiff assigned as errors the overruling of his demurrer to the second paragraph of the defendant's answer, and the overruling of his motion to modify the judgment and decree. The record then contains the following entry, made on the 6th day of February, 1882: "Come now the parties by their attorneys, and the court, being fully advised in the premises, gives the following judgment in reversal, the opinion being pronounced by the Hon. Daniel W. Howe, Judge, in the words and figures, to wit:" (Opinion omitted by direction of appellant's attorney.) * * * "It is therefore considered and adjudged by the court that the judgment rendered in this cause at special term be and the same hereby is in all things reversed, and the cause remanded to special term for further proceedings in accordance with the foregoing opinion."

Whereupon appellant, who was appellee in general term below, appealed to this court, and has assigned the following errors:

1st. The court in general term erred in reversing the judgment of the court in special term.

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2d. The court also erred in rendering judgment against appellant, appellee below, for costs.

3d. The court also erred in not modifying decree as asked in special term below.

The last alleged error is not a proper specification in this court; it might have been assigned in the general term of the superior court, but can not in this.

We see nothing in the second alleged error; costs upon the reversal of a judgment would naturally follow against appellee, unless some good cause to the contrary was shown.

The first specification of errors filed in this court is properly assigned; but the record is not in a condition to make it available. The last clause of the 1360th section of the R. S. of 1881, providing for appeals from the special term to the general term of the superior court, provides, that "It shall, if the judgment of the special term be not affirmed, enter of record the error or errors found therein, and remand said cause to the special term, with instructions as to said error or errors; and the special term shall carry into effect the instructions of the general term."

In this case the general term reversed the judgment of the special term; but the opinion reversing it is not in the record, nor does the record show what error or errors were found by the general term in the proceedings of the special term, nor what instructions the general term gave to the special term for the correction of the errors found, other than as contained in the opinion omitted in the record. From the record we can not tell whether the judgment was reversed upon the error assigned by appellant, or the errors assigned by appellee below, or upon what error or errors. In the absence of any information by the record upon these questions, the presumption is that the court in general term did right.

In the case of *Gutperle v. Koehler*, 84 Ind. 237, the following language is used: "The opinion delivered at the general term of the superior court is not found in the transcript, having been omitted, it seems, by direction of the appellant, and,

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consequently, it does not appear for what reason the judgment was reversed. * * * * *

“But, for the purpose of deciding this case, it is enough that the record does not show upon what ground the judgment of reversal was based. While it is a sufficient assignment of error in this court, that the superior court at general term erred in affirming or in reversing a judgment, yet the record must be so made up as to bring before this court the points decided by that court.”

That case, we think, is decisive of the one under consideration; and we think the record is not made up in this case so as to properly present the questions designed by the parties to be presented. The record should either contain the opinion of the superior court in general term, or be so made up as to show the error or errors found, and the directions given to the superior court in special term as to the correction of the errors. Without the record showing either, this court can not determine what errors were found or how to direct their correction.

The judgment of the general term ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court in general term below be and it is in all things affirmed, with costs.

No. 10,668.

FOWLER v. THE STATE.

CRIMINAL LAW.—*Justice of the Peace.—Discharge of Jury.*—The strict rules governing trials for felonies in courts of superior jurisdiction are not applicable to trials before justices of the peace for misdemeanors; hence the discharge of a justice's jury, after three hours' deliberation, it being then late in the night, the defendant not objecting, but demanding another trial, will be presumed to have been regular, and will not bar another prosecution.

SAME.—*Instruction to Jury.—Jury Judges of the Law.*—In criminal cases the jury are, by the 19th section of the Bill of Rights, the judges of the law

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as well as the facts, and need not be governed by the instructions of the court or the decisions of the Supreme Court, and it is proper for the court to so instruct the jury.

ELLIOTT and ZOLLARS, JJ., dissent.

INTOXICATING LIQUOR.—*Sale Without License.*—*Time.*—*Statute of Limitations.*

—Time is not of the essence of the offence of selling liquor without license, and hence the time charged need not be strictly proved, but it will be sufficient to show that the act was done at any time within the statute of limitations.

From the Henry Circuit Court.

J. Brown, W. A. Brown, D. W. Chambers and J. S. Hedges,
for appellant.

F. T. Hord, Attorney General, L. P. Newby, Prosecuting Attorney, and W. B. Hord, for the State.

ELLIOTT, J.—The appellant was convicted of violating the statute prohibiting the sale of intoxicating liquor in less quantities than a quart.

It appears from the evidence that he was prosecuted for the same charge before a justice of the peace; that the jury called to try him, after “deliberating for several hours” as the record of the justice recites, and, as the record also states, “the court, being satisfied that the jury could not agree, discharged them and continued the case until the 18th day of October, 1882.” On the 17th day of that month the defendant requested and obtained a venire for another jury, and when the case was again called for trial the State dismissed the prosecution. It is shown by testimony of witnesses that the jury were kept together for about three hours, and until late in the night. As to whether the appellant was informed of the discharge of the jury at the time the order was made, there is some conflict in the testimony, as there is on the question whether he was actually in the room when the order was given by the justice, but he was near by and was informed of the justice’s order immediately after it was made. No objection was then made by him, nor was there any made afterwards, nor was there any motion for a discharge.

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The decisions which declare the rule governing in cases of trials in courts of superior jurisdiction in cases of felony, can not be applied in their rigorous strictness to trials before justices of the peace upon a charge of a misdemeanor where no severe penalty can be inflicted, and where an appeal lies which secures a trial *de novo*. It is obvious that the phrase, "a reasonable time," is a relative one, and is to be considered as having relation to the forum, the character of the charge, and the extent of the penalty. It would be unreasonable to require a jury to be kept a great length of time in a justice's court where the charge is not one of very great gravity and the punishment can not extend beyond a fine of a few dollars.

We can not say that the justice did not, under the circumstances of this case, keep the jury together for a reasonable length of time. It may be that it would have been at the expense of the health of the jurors to have kept them together without proper accommodations, and we know that the State makes no provisions supplying accommodations for the juries called before justices, and we know, also, that justices are not bound to provide convenient places for them.

It must be presumed, in favor of the action of the justice, that there was a valid reason for discharging the jury. A justice's jury is not in the same situation as a jury under the charge of a sheriff, for, in the latter case, accommodations for their comfortable maintenance during their deliberations are provided by the public authorities.

If it should be held that the discharge of the jury entitled the appellant to his discharge, it is clear that, as he did not object to the action of the justice, nor move for his discharge, but on the contrary acquiesced in that officer's ruling by demanding of him another jury, he waived his right, if any he had, to afterwards insist that the trial bars another prosecution for the same offence. *Long v. State*, 46 Ind. 582. There was no objection made by him to the action of the justice at any time, nor did he present any objection before the trial on the information afterwards filed against him; on the contrary,

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he voluntarily, and without objection, submitted to the empanelling of a jury in the circuit court and made no reference to the proceedings before the justice until after the trial had been entered on, and then relied upon them as evidence entitling him to an acquittal.

We need not set out the instructions of the court upon this point. It is only necessary for us to say of them, that they were more favorable to the appellant than he had a right to ask.

The court did not err in charging the jury that the State was not bound to prove a sale on the day laid in the indictment. Time is not of the essence of such an offence as that charged in the information, and it was sufficient for the prosecution to prove a sale at any time within the statute of limitations applicable to such offences.

The court, over the objection of the appellant, gave this instruction: "You are the judges of the law and the evidence, and of what facts are proved and what facts are not proved. It is the duty of the court to instruct you in the law, but his instructions are advisory only, and you may disregard them and determine the law for yourselves. Likewise, the decisions of the Supreme Court read to you by the defendant are not binding upon you, but you may disregard them and determine yourselves what the law is." On the authority of *Keiser v. State*, 83 Ind. 234, this instruction must be held correct. From the conclusion reached in that case, the writer dissented, and adheres to his dissent.

It seems to the writer that the decision in the case cited is wrong for these reasons:

1st. Regarding the decisions of the highest court of the State as mere evidence of the law, they are conclusive evidence, binding upon courts and juries alike.

2d. Decisions of the Supreme Court bind the trial court, and what binds the trial court necessarily binds the jury, which is, in legal contemplation, a part of the court, using, of course, the term court as meaning a tribunal where justice is judicially administered.

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3d. Law is the rule declared by the statutes or established by the decisions of the supreme judicial tribunals, and the Constitution, in speaking of law, means the rule thus established and declared, and not the judgments of individual jurors in particular cases.

4th. Law, as used in the Constitution, means a rule prevailing over the entire State, and not the notions of juries called to try criminal cases.

5th. Law, as used in that instrument, means a rule established by some competent authority; that authority is either judicial or legislative, and juries have not the semblance of any such authority.

6th. There is an ultimate source of law, and that is either in the judiciary or in the Legislature, and men who are called into the jury-box possess neither judicial nor legislative powers, and can not be the source from which the law, using the term in the sense intended by the Constitution, is obtained.

Complaint is made by the appellant of a modification of an instruction asked by him. The instruction as asked declared that the discharge of the jury by the justice in the trial before him released the appellant, and the court added the following: "Unless the jury believe from all the evidence; beyond a reasonable doubt, that he consented to such discharge, and you may, in determining the question of such consent, consider all the facts and circumstances surrounding the discharge of such jury." It is evident from what has been said that there was no error in this. There would, indeed, have been no error in refusing the instruction as it was originally written.

Judgment affirmed.

ZOLLARS, J.—I concur in what is said by ELLIOTT, J., respecting the decision in *Keiser v. State*.

Lee v. Basey et al.

No. 9590.

LEE v. BASEY ET AL.

PLEADING.—*Complaint for Relief from Judgment by Default.*—A complaint, under section 99 of the code, R. S. 1881, sec. 396, for relief from a judgment by default, should show, it seems, the nature of the cause of action on which the judgment was rendered, and a pertinent and good defence thereto.

PRACTICE.—*Action upon Joint Contract.*—*Dismissal as to One of Two or More Defendants.*—*Review of Judgment.*—The dismissal of an action as to one of the defendants served with process in an action upon a joint obligation is no cause for a review of the judgment entered against the other defendants.

SAME.—*Abatement.*—*Defect of Parties.*—*Demurrer.*—*Waiver.*—A defect of parties, if apparent on the face of the complaint, is cause for demurrer; otherwise it must be pleaded, and, if not taken advantage of in either of these ways, is waived.

From the Tipton Circuit Court.

R. B. Beauchamp and *G. H. Gifford*, for appellant.

D. Waugh and *J. M. Fippen*, for appellees.

WOODS, C. J.—Complaint in two paragraphs by the appellant against the appellee Basey, and against others who are nominal parties only. By the first paragraph, the appellant sought, under the 99th section of the code, to be relieved from a judgment theretofore recovered against him by Basey upon default; and, by the second paragraph, to have the same judgment reviewed for errors alleged to be manifest on the face of the record.

The court sustained a demurrer to the second paragraph; and, upon a hearing had upon the first paragraph, which, with affidavits and counter affidavits, was submitted to the court, found for the defendants, and gave judgment accordingly.

It is doubtful whether the first paragraph of the complaint is good. It does not show upon what alleged cause of action the judgment from which relief is sought was rendered. The allegation in this respect is that Basey filed his complaint against the appellant and two others "for the sum of \$400," but whether for money due on account, or a promissory note

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or other contract, or for damages arising out of a tort, is not shown. The alleged defence to the cause of action on which the judgment was rendered is this: "That the cause of action set forth in the complaint of said Basey has no merit whatever; that this plaintiff is not indebted to the said Basey in any sum whatever; neither was he owing or in any manner whatever indebted to the said Basey at or before the date of the rendition of the said judgment."

It would seem clear that the complaint ought to have shown the nature of the cause of action on which the judgment was entered, and then should have shown a pertinent and sufficient defence thereto; but, as this point is not made in the briefs, we pass it by.

The evidence concerning the plaintiff's alleged excuse for suffering the judgment to go by default is conflicting, and we can not say that the court did not reach the right conclusion. According to the showing of the plaintiff, supported by the affidavits of others, he employed one of his co-defendants, an attorney at law, to appear for him in the case, and a few days before the return day of the summons went to Kansas in search of a witness, his son, who, without his knowledge, had recently left this State and gone to that; that, on his arrival at Crawford county, Kansas, he was taken sick, failed to find his son, and, as soon as he could travel, returned to his home in Tipton county, where he arrived three or four days after the default was entered, but was too sick to attend to business until the term of court had closed at which the judgment was rendered; and that he did not, until some time after the close of the term, know that judgment had been taken against him.

On the other hand, his alleged attorney made an affidavit, not, perhaps, clearly in harmony with his affidavits made in behalf of the appellant, that he had told the appellant that he would appear as attorney in the case if the appellant would pay him therefor; but that, without paying him anything or saying that he would pay, the appellant went away, and he did not consider himself employed.

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In reference to the visit of the appellant to Kansas, affidavits were read of witnesses who testified to the effect that they were with and saw the appellant while he was in Kansas; that he was not sick, but spent his time viewing the country, visiting friends, and attending Indian dances; and the facts stated in these affidavits, which, in many details, were inconsistent with the showing of the appellant, he allowed to go without denial or attempt at explanation.

The court may well have concluded that if there had been an employment of an attorney it was solely for the purpose of delay, and that the visit to Kansas, if it had any relation to the suit at all, was in aid of the same purpose. To say the least, the circuit judge was in a better position than we are to determine the truth and merits of the conflicting evidence.

The ruling upon the demurrer to the second paragraph of the complaint was right.

The first error alleged is that the complaint in the original action did not state facts sufficient. The objections suggested are: That the complaint is not signed by the plaintiff or by any one acting as his attorney; that the bill of particulars following the complaint is not "marked as an exhibit thereto," and is not specific enough.

The complaint is that the defendants are indebted to the plaintiff \$400, "for money had and received, a bill of particulars of which is filed," etc., and is signed, "Dan. Waugh, plff. atty." Immediately following is a statement headed "Bill of Particulars," showing the defendants by name to the plaintiff by name "Dr. \$400, in money. A. D. 1877." Signed by the plaintiff. The objections to the complaint are baseless.

Before taking judgment the plaintiff in the action dismissed as to one of the defendants, and this is assigned as error. It was not error. Conceding, as counsel argue, that the action was upon a joint contract, and that all of the alleged contractors had been served with process, the dismissal of the action as to one of them affords no cause for setting aside the

Wray v. Hill *et al.*

judgment entered against the others. Such dismissal might, perhaps, have afforded the appellant ground for a plea in abatement, but we do not perceive in what other way he could have turned it to his advantage. It is not an error apparent in the record for this if for no other reason, it does not appear but that the party as to whom the action was dismissed had died since the service of summons. *Bledsoe v. Irvin*, 35 Ind. 293.

Defect of parties, if apparent on the face of the complaint, is cause for demurrer; otherwise it must be pleaded, and, if not taken advantage of in either of these ways, "the defendant shall be deemed to have waived the same." R. S. 1881, section 343.

Judgment affirmed.

No. 9169.

WRAY v. HILL ET AL.

PRACTICE.—Finding by Court.—Harmless Error.—When a cause is tried by the court without the intervention of a jury, its finding takes the place of a verdict, and can not be afterwards vacated or changed at the pleasure of the court; but a party not injured thereby can not maintain a suit to set aside such unauthorized proceeding.

From the Shelby Circuit Court.

A. Major and *S. Major*, for appellant.

N. B. Berryman, *T. B. Adams* and *L. T. Michener*, for appellees.

ELLIOTT, J.—The appellant seeks to have a finding and judgment of the trial court set aside.

It is shown by his verified complaint, that, after issue had been duly joined, the cause was submitted to the court for trial; that the court did make, and announced in the presence of

85	546
125	9
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129	578
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131	545
85	546
134	94
136	305
85	546
137	287
139	349
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148	237
149	192

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the attorneys, a finding in favor of the appellant and against Moor, one of the parties to the action, to the effect that "his" (Moor's) "mortgage was satisfied as to Wray;" that, pursuant to this finding, the latter's attorney prepared and handed to the clerk a draft of a decree adjudging, in accordance with the finding, that Moor's mortgage was satisfied; that afterwards, but at the same term, the court, without notice, set aside this finding and erased from the decree the order concerning the satisfaction of the mortgage; that neither Wray nor his attorney had any knowledge of this action of the court until after the close of the term.

A court in the trial of an issue of fact takes the place of a jury, and its finding is essentially the same in its scope and effect as the verdict of a jury. *Wright v. Hawkins*, 36 Ind. 264; *Maynard v. Mier, ante*, p. 317. In trying issues of fact the court occupies a different position from that occupied when making orders, or when entering judgments and decrees. Its decision upon a question of fact can not be set aside upon the ground that it is an amendment or correction of a record, for it is an act of an altogether different character. It is one thing to decide that a fact does or does not exist, and quite another thing to correct a record or supply an omission.

The statute evidently means that the finding of the court upon a question of fact shall stand upon substantially the same footing as the verdict of a jury, for the provisions concerning new trials apply as well to the decisions of the court upon questions of fact as to the verdicts of juries. The adjudged cases proceed upon this theory, for it is uniformly held that where a special finding is defective the remedy is by motion for a *venire de novo*, and that where the facts are not correctly found the method of procedure is a motion for a new trial. That a finding of the court can not be vacated at its own pleasure is evident from the fact that, after its finding has been announced, the plaintiff can not dismiss his action, although he may do so at any time before the announcement.

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Livergood v. Rhoades, 20 Ind. 41; *Burns v. Reigelsberger*, 70 Ind. 522. In *Walker v. Heller*, 56 Ind. 298, the court, on the 31st day of the term, directed the clerk to enter of record a finding and judgment in favor of the defendant; on the 33d day of the same term, it directed a change to be made, and it was held that the latter order was erroneous. We are clear that the court erred in setting aside its finding upon the question of fact that Moor's mortgage was satisfied.

The action in which the judgment from which the appellant seeks relief was rendered was brought by Hill against Wray upon two promissory notes executed to George M. Wright, commissioner. Wray filed an answer in the nature of an interpleader, and also a cross complaint, which brought Moor into court, and he answered the cross complaint and also filed an answer and cross complaint. Hill answered, and replies were filed by Moor and the appellant to his answer. These pleadings put in issue the right of Hill to the money due upon the notes, as also the validity of a mortgage claimed by Moor to be a lien upon land purchased by appellant from Wright at a sale made by him as commissioner under a decree of partition. The judgment of the court, omitting the introductory part, which is a mere general finding, is as follows: "And it is further ordered and adjudged by the court that the plaintiff T. Wiley Hill do have and recover of the said defendant Hardy Wray the sum of \$742.74, to be levied and collected, without relief from valuation or appraisement laws, and with interest thereon at the rate of six per cent. per annum until paid, together with costs. And it is finally ordered and adjudged by the court that the said Hardy Wray have and recover from said Moor, as administrator of the estate of John Trimble, deceased, the costs made and occasioned by the answers and cross complaints of the said Moor." The general finding in the introductory part of the order is in favor of Hill against both Wray and Moor; there is no finding as to the issues joined between Moor and the appellant, but there is a finding that no part of the amount due upon the notes

McComas v. Long *et al.*

shall be paid to Moor, and that it shall be all paid to Hill. We are unable to perceive how the error of the court in changing its finding by erasing the part designated in the early part of this opinion has harmed the appellant. The judgment still stands in his favor against Moor, and he has suffered no injury. The only change made is in the finding which was made on the issues joined between him and Moor, and this could have done him no harm, for the judgment is against Moor upon the issues joined between them, and the appellant could have obtained nothing more had the finding remained unchanged, for it in no way affected the rights of Hill. It is perhaps true, that, had the finding remained as announced, the judgment would have been more plainly decisive of the rights of Moor under his mortgage; but, as it reads, there is enough to bar any claim by him upon the matters put in issue by the pleadings, and involved in the issues submitted to the court.

It seems to us that the appellant is really seeking to set aside a judgment which is favorable to him as against the party affected by the change made in the finding of the court.

Judgment affirmed.

No. 9800.

McCOMAS v. LONG ET AL.

TRUST AND TRUSTEE.—So long as moneys held in trust can be distinctly identified, the trust may be enforced against any one into whose hands it comes; *aliter* where this can not be done.

DECEDENTS' ESTATES.—*Liability of Distributees.*—Where an administrator embezzles the assets of an intestate, and dies, having so mingled such assets with his own that they pass to his administrator and can not be identified, those entitled to distribution of the first estate, having made no claim until after settlement and distribution of the last estate, can not maintain a suit against those to whom the last estate has passed by distribution.

From the Montgomery Circuit Court.

McComas v. Long et al.

B. Swank, D. A. Roach and N. P. H. Proctor, for appellant.
T. H. Ristine, H. H. Ristine and B. T. Ristine, for appellees.

MORRIS, C.—The appellant, who was the plaintiff below, alleges in her complaint that, on the 26th day of September, 1856, Alexander Croy died intestate, at the county of Montgomery, State of Indiana, leaving surviving him, as his only heirs, his widow, Julia A. Croy, and the following named children, to wit: Alexander Croy, Isaac Croy, Julia Loftland, Frederick Croy, John Croy, Elizabeth Croy, David Croy, Jeannetta Croy, Henry Croy, Sampson Croy, Richard Croy, Ellen Wood, and this plaintiff; that, on the 11th day of October, 1856, David Long was appointed administrator of the estate of the said Alexander Croy, deceased; that afterwards said David Long, as such administrator, received from said estate assets belonging to it to the amount of \$12,994.44; that, on the 5th day of January, 1859, said administrator, after full payment of all the debts and liabilities of said estate, and the expense of administering the same, had remaining in his hands for distribution among the heirs of said Alexander Croy, deceased, of the money derived from the personal assets of said estate, the sum of \$11,193.60; that said David Long, administrator aforesaid, did not at any time pay to this plaintiff her distributive share of said estate, but kept and retained the same until the time of his death, when the same passed into the hands of his executor, and was by his executor passed into the hands of the defendants as heirs of the said David Long; that she has received no part of her distributive share of said estate; that it now amounts to the sum of \$2,000, which is due and unaccounted for.

It is further averred, that, on the — day of October, 1872, the said David Long died testate, in said county and State, leaving as his only heirs at law, his widow, Mary Long, and the following named children, to wit: Henry Long, David L. Long, Mary G. Trout, wife of her co-defendant Hannibal Trout, Sarah R. Carney, Elizabeth Kenworthy, Nancy Hig-

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gins, and Phoebe Lee; that the said estate of the said David Long has been finally settled by the executor thereof, and said executor discharged by this court on the — day of September, 1878; that the said defendants, as the heirs of the said David Long, received from his said estate, through the executor thereof, all the property that was in the possession of the said David Long at the time of his death, amounting to the sum of \$2,000 to each of said defendants; that they received all the property of the said David Long, whether held by him as executor or otherwise, including the plaintiff's said distributive share of the estate of the said Alexander Croy, deceased, and that they have not at any time accounted to the plaintiff for the same. Wherefore the plaintiff prays that an account be taken by the court, that she have judgment for what may be found due her on said accounting, and for other proper relief.

The appellees demurred to the complaint; the court sustained the demurrer, and, the appellant declining to plead further, final judgment was rendered for the appellees.

The error assigned is the sustaining of the demurrer to the complaint.

The appellant insists that the fund held by David Long was a trust fund, and that the trust adhered to the fund until it passed into the hands of the appellees; that they took the fund from the executor as trustees for the appellant, and as such trustees, rather than as the heirs of David Long, they are liable to account to her for the fund so received by them from the executor of their father's estate; that the appellant was not required to file and account for her distributive share of her father's estate in the hands of David Long at the time of his death as the administrator of her said deceased father, but that she may charge any one who has come into the possession of the fund without having given value for it, and require him to account for it as trustee.

The appellees assume that the facts stated in the complaint show at the most but a claim in favor of the appellant against the estate of their testator, David Long; that, as the claim

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was not filed against said estate of David Long within one year, the complaint is bad, and the demurrer to it rightly sustained.

For aught that appears in the complaint, David Long had mingled the funds sued for with the mass of his own estate. There is nothing to show that it did not come into the hands of Hannibal Trout, the executor of David Long, as an apparent part of the assets of David Long's estate, without any means of identifying it as a trust fund. Nor does the complaint attempt to trace or identify the assumed trust fund as separate and distinct from the mass of money and property belonging to David Long at the time of his death, nor as forming a distinct part of the assets which came into the hands of his executor to be administered. We are inclined to the opinion that the facts stated in the complaint only show a claim in favor of the appellant against the estate of David Long, and that they do not authorize her to charge the defendants below as trustees of the fund.

"The right to follow trust moneys will continue so long as the identity of the funds can be established. The identity does not consist in specie, that is, in the particular pieces of coin, but in the fund itself. But the right of pursuit will fail, where the means of ascertaining fails; as, when the trust property is converted into money and has passed away; or has passed into a mass of property of the same description, and can not be separated." *Tiffany & Bullard Trusts and Trustees*, p. 33. *Perry Trusts*, section 128.

It was held in *Thompson's Appeal*, 22 Pa. St. 16, that where the executor mixes a trust fund with his own money or property, so that the particular money can not be identified, the beneficiary has no preference over other creditors, and must prove his claim.

It is not alleged in the complaint that any claim was filed by the appellant against the estate of David Long, as required by section 62 of the act for the settlement of decedents' estates, 2 R. S. 1876, p. 512; nor is it alleged that six months

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prior to the final settlement of the estate of David Long, the appellant was insane, an infant, or out of the State. It follows that the demurrer to the complaint was properly sustained, and that the judgment below should be affirmed. *Voris v. State, ex rel.*, 47 Ind. 345; *Freeman v. State, ex rel.*, 18 Ind. 484; *Hartman v. Lee*, 30 Ind. 281.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 10,592.

SMITH v. THE STATE.

CRIMINAL LAW.—*Affidavit and Information.*—*Unlawful Conversion of Estray Property.*—Where an affidavit and information contain a good and sufficient charge of the unlawful conversion of estray property, before the title thereto had vested in the defendant, they will not be held bad, on a motion to quash, merely because they contain other matter not sufficient to constitute a charge of another public offence, which may properly be regarded as surplusage.

SAME.—*Pleading.*—*Language of Statute.*—In criminal pleading, as a general rule, it is sufficient to charge the offence, whether in an affidavit, information or indictment, in the language of the statute defining the offence.

SAME.—*Former Acquittal.*—*Sufficiency of Plea.*—If it appear that the same evidence will be required to secure a conviction in a pending, as in a former, prosecution, a plea of former acquittal, if sufficient in form, is a complete bar to the pending prosecution.

From the Pulaski Circuit Court.

G. Burson and W. Spangler, for appellant.

F. T. Hord, Attorney General, and W. B. Hord, for the State.

HOWK, J.—This was a prosecution by affidavit and information, against the appellant, for an alleged violation of the provisions of section 50 of the misdemeanor act of June 14th, 1852 (section 2157, R. S. 1881), concerning the unlawful appropriation of estray property. The appellant's motion to

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quash the affidavit and information having been overruled by the court, and his exception saved, he filed a special plea in bar of the prosecution. The State, by its attorney, demurred to this special plea, for the alleged insufficiency of the facts therein to constitute a defence; which demurrer was sustained by the court, and the appellant excepted to this ruling. Upon his plea of not guilty, the issues joined were tried by a jury, and a verdict was returned finding him guilty as charged, and assessing his punishment at a fine in the sum of \$16; and the court rendered judgment on the verdict.

The following decisions of the trial court are assigned as errors by the appellant:

1. In overruling his motion to quash the affidavit and information; and,
2. In sustaining the State's demurrer to his special plea in bar.

In the affidavit and information it was charged, in substance, that on the 24th day of August, 1880, in Indian Creek township, at Pulaski county, the appellant took up, as estrays, one white male hog of the value of \$8, and one white female hog of the value of \$8; also, four white shoats, each of the value of \$4, and all of the aggregate value of \$32, the property of one Jacob March; that the appellant afterwards, on or about the 20th day of November, 1880, at said county, unlawfully converted said hogs and shoats to his own use, before the title thereof had vested in him, according to law, by then and there unlawfully killing and butchering and putting down, for his own use, said hogs and shoats, and by then and there having unlawfully failed and neglected to advertise the taking up of said hogs and shoats in writing, in three of the most public places in said township, where said hogs and shoats were taken up by the appellant, as Jacob March had complained on oath, contrary to the form of the statute, etc.

The offence charged, or intended to be charged, against the appellant, was defined and its punishment prescribed in section 50 of the misdemeanor act of June 14th, 1852, in force

at the time of the alleged commission of the offence. This section provided as follows:

“ If the taker up of estray property, shall suffer the same to be taken out of the county for more than three days at a time, or shall convert the same to his own use before the title thereto shall vest in him according to law, or, if he or any officer shall knowingly and wilfully violate any of the provisions of the law regulating the taking up of estrays, such person or such officer shall be fined not exceeding one hundred dollars or imprisoned not exceeding six months.” 2 R. S. 1876, p. 475.

This section was re-enacted without change, except as to the punishment prescribed, as section 245 of the public offence act of April 14th, 1881, which latter section is section 2157 of R. S. 1881.

In the affidavit and information, in this case, the appellant is charged with the commission of two of the offences defined in the statute, namely: 1. The unlawful conversion to his own use of the estray property, before the title thereto had been vested in him according to law; and, 2. It was intended and attempted to charge that he knowingly and wilfully violated the provisions of the estray law, in regard to advertising the taking up of the estray property. It may be doubted whether the statements in the affidavit and information were or were not sufficient to charge that the appellant, knowingly and wilfully, violated the provisions of the estray law, in relation to advertising the taking up of the estray property; but, if they were not sufficient, they may well be regarded as mere surplusage, and would not vitiate the affidavit and information if they were otherwise good. It is certain, we think, that they contained a good and sufficient charge, against the appellant, of his unlawful conversion to his own use of the estray property, before the title thereto had vested in him according to law. The charge is made substantially in the language of the statute defining the offence, and, as a general rule, this is sufficient. *State v. Bougher*, 3 Blackf. 307; *Malone v. State*, 14

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Ind. 219 ; *Adell v. State*, 34 Ind. 543. We know of no reason why a different rule should be applied to the statement of the offence, in the affidavit and information, in the case at bar.

The appellant's counsel have cited the case of *Greene v. State*, 79 Ind. 537, and insist with much earnestness that it is decisive of the question under consideration, in favor of the appellant. We do not think, however, that the case cited is in point here. In that case the indictment charged that the defendant unlawfully took up five estray sheep, and unlawfully converted the same to his own use ; and it was held that the indictment did not charge an offence under the statute. In delivering the opinion of the court ELLIOTT, C. J., said : " It is very clear that the provision concerning the unlawful conversion of estray animals does not cover cases of an illegal taking up. The provision under immediate mention refers to cases where, by due process of law, the title may vest in the person taking up the estray. The phrase, 'before the title thereto shall vest in him according to law,' implies that the taker up may acquire title by conforming to, and proceeding in accordance with, the provisions of the estray law. It can not refer to cases where the animal is unlawfully taken up, for the reason that such person can not acquire title."

In the case now before us it is not charged that the taking up was unlawful, and, in the absence of such charge, it may be assumed that the taking up was, as it might have been, in strict accordance with the provisions of the estray law. The court did not err, we think, in overruling the motion to quash the affidavit and information.

In his special plea the appellant averred, in substance, that at the March term, 1882, of the court below, upon an indictment duly returned at its preceding January term, predicated upon the same facts mentioned in the affidavit and information in this case, and charging him with the larceny of the same hogs and shoats, the appellant had been duly tried for such larceny, and acquitted and discharged. Conceding that the averments of this plea were sufficient in form to constitute

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a good plea of former acquittal, which may well be doubted, the question remains, were the facts relied upon sufficient in substance to constitute a bar to this prosecution? It is very clear, we think, that this question must be answered in the negative. The true test to determine the sufficiency or insufficiency of a plea of former acquittal as a bar to the pending prosecution, is this: would the same evidence be necessary to secure a conviction in the pending, as in the former, prosecution? If it would be, then the plea of former acquittal would be a complete bar to the pending prosecution; otherwise, the plea would not be sufficient. *State v. Warner*, 14 Ind. 572, and *note*; *State v. Elder*, 65 Ind. 282 (32 Am. R. 69); *State v. Hattabough*, 66 Ind. 223.

It is manifest that the evidence necessary to secure the appellant's conviction in the pending prosecution would not have justified his conviction of the larceny charged in the former case. His plea of former acquittal, therefore, was clearly insufficient.

We have found no error in the record requiring the reversal of the judgment.

The judgment is affirmed, with costs.

No. 9587.

BUNNELL v. DAVISSON.

PLEADING.—Evidence.—Uncertainty.—The averments of a pleading must be clear and unequivocal; but the evidence in support thereof may be sufficient, though uncertain or ambiguous.

CONTRACT.—Live-Stock.—Keeper's Lien.—Statute Construed.—Evidence.—Replevin.—The evidence showed a contract whereby the defendant undertook, for a price stated, to keep fifty head of cattle for the plaintiff in a manner and for a time stated; and that the defendant performed the agreement. *Held*, in an action of replevin, that the jury was warranted in inferring that the defendant was in the business of feeding live-stock, and accordingly entitled under section 5292, R. S. 1881, to a lien.

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SAME.—*Express Stipulation Excludes Implication.*—If a contract for feeding and caring for cattle provides specifically what shall be done in certain particulars, any implication of duty to exercise reasonable care in those particulars is excluded, and the stipulated things must be done.

From the White Circuit Court.

H. P. Owens and *W. E. Uhl*, for appellant.

J. H. Wallace, for appellee.

WOODS, C. J.—Complaint in replevin by the appellant against the appellee, for the recovery of forty-nine head of cattle; answer of general denial; trial, verdict and judgment for the appellee. The appellant moved for a new trial, because the verdict was contrary to law and to the evidence, and because of alleged error in the instructions given by the court, of its own motion, to the jury.

Upon the proposition that the verdict is not according to the law and the evidence, counsel say: "It was conceded that the appellant was the owner of the cattle, but his right to the possession thereof was denied by the appellee, who claimed the right to hold them on account of a balance due him for taking care of and feeding the cattle, for which he claimed a lien on them;" and after setting out the statute of January 27th, 1853, see R. S. 1881, section 5292, counsel add: "To entitle one to hold a lien upon live-stock for feed and care, * * he must show that he is a livery-stable keeper, or that feeding live-stock is his business. * * * The language of the statute is: 'The keepers of livery-stables and all others engaged in feeding horses, cattle,' etc., *i. e.*, engaged in the business of feeding such live-stock. The case of *Conklin v. Carver*, 19 Ind. 226, is directly in point."

In the case referred to the question was one of pleading, not of proof, and it was held that an engagement of a farmer to keep and feed two colts belonging to the plaintiff from November until the ensuing March, it not being averred that the farmer was engaged in the business of keeping and feeding stock, was not within the statute. The question in the case before us is

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one of evidence, and the jury may have inferred from the contract between the parties, especially when aided by the circumstances necessarily brought to their attention upon the trial, that such was the business of the defendants. Indeed, the performance of the contract itself, by which the appellee undertook, for \$1.25 per head per month, to keep for the appellant fifty head of cattle, "to put them on stock pasture during the day and to put them in a pound at night provided with racks in which to feed straw, and to water, salt and care for them," may well have been thought enough to constitute a business.

The averments of a pleading must be clear and unequivocal, but the evidence in support thereof may be sufficient, though uncertain or ambiguous. *Lemmon v. Whitman*, 75 Ind. 318 (39 Am. R. 150).

The court gave a single instruction to the jury, consisting of several unnumbered clauses, one of which the appellant embodied as a cause in his motion for a new trial. His counsel say of it: "The error consists in excluding the question of reasonable care in appellee's treatment of appellant's cattle, on the supposition of a contract between the parties in relation thereto. The instruction says: 'The question is not what should have been reasonable and proper care under the circumstances, provided the parties by their agreement stipulated the extent and character of the care and feed which the defendant should bestow upon the cattle. If you find, therefore, that by the agreement of the parties the defendant agreed to feed and care for the plaintiff's cattle, and the extent and character of the care and feed were agreed upon, the law would require of the defendant a substantial compliance on his part with the terms of the contract, and no more.' * * The defendant" (counsel proceed to say) "may carelessly have suffered the cattle, when the stock pasture was fresh and rich, to have remained upon it too long at a time, whereby they got too much corn, and were scoured and foundered, and thereby injured and reduced in flesh, yet the appellee was not

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bound to use such reasonable and proper care as would have prevented such injury."

In addition to the language quoted by counsel, the court instructed, that "if the defendant received the cattle from the plaintiff, agreeing to feed and care for them, without any express agreement as to the extent and character of the care and feed, then the law would imply a promise on his part that he should bestow such reasonable care and attention in caring for and feeding the cattle as ordinarily prudent stock feeders and farmers would bestow upon stock of this kind. The question as to the nature of the contract made, if any, as well as the question of its fulfilment, is for the jury to determine from the evidence."

The substance of the instruction complained of is, that an express stipulation excludes an implication upon the same point; that if it was explicitly agreed just what the defendant should do in taking care of the cattle, as that in the daytime he should keep them on stock pasture, and in the nighttime in pounds supplied with racks of straw, it would necessarily follow that in these respects the defendant was bound by the express stipulations; and if, by reason of the stalks being fresh and too rich, the cattle injured themselves by eating too much, the defendant is not responsible for the consequences. This must be right. If the defendant, in the exercise of that care which the appellant now insists he was bound to employ, had admitted the cattle into the stock fields for parts only of each day, and had kept them to the straw ricks the remainder of the time, and the appellant had been discontented with the result, it could hardly have been permitted the defendant to plead the exercise of care, according to his own judgment, as an excuse for the breach of his express agreement. The rule must work both ways.

We conclude that in respect to the particular objection made to it, the instruction as a whole could not have harmed the appellant.

Judgment affirmed.

Hodge v. The State.

No. 10,626.

HODGE v. THE STATE.

CRIMINAL LAW.—*Prosecution by Affidavit and Information.—Jurisdictional Facts.*—Under section 1733, R. S. 1881, where a prosecution is by affidavit and information, it is not necessary to state in the information the jurisdictional facts which must exist, under the provisions of section 1679, R. S. 1881, to entitle the State to prosecute the defendant by information based upon affidavit instead of by indictment.

SAME.—*Sufficiency of Evidence.—Supreme Court.*—Where it appears that the jury were authorized by the evidence in the record to find the defendant guilty, the Supreme Court will not disturb their verdict on the evidence.

SAME.—*Instructions to Jury.—Omission to Instruct.—Available Error.*—Where the court's instructions to the jury are right, but there is an omission to instruct on some point, the defendant can not, by merely saving an exception to the instructions given, get an available error into the record on account of such omission to instruct.

From the Henry Circuit Court.

J. M. Brown, for appellant.

F. T. Hord, Attorney General, *L. P. Newby*, Prosecuting Attorney, and *W. B. Hord*, for the State.

HOWK, J.—This was a prosecution against the appellant, upon affidavit and information, for the offence of grand larceny. The appellant's motion to quash the affidavit and information was overruled by the court, and his exception saved to this ruling. Upon his arraignment and plea of not guilty, the issues joined were tried by a jury and a verdict was returned finding him guilty as charged, and assessing his punishment at confinement in the State's prison for eighteen months, a fine in the sum of \$40, and disfranchisement for two years. Over his motions for a new trial and in arrest of judgment, and his exceptions saved, the court rendered judgment on the verdict.

The following decisions of the circuit court are assigned as errors by the appellant:

1. In overruling his motion to quash the affidavit and information;

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85	561
144	430
147	10

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2. In overruling his motion for a new trial ; and,
3. In overruling his motion in arrest of judgment.

The first and third of these alleged errors call in question the sufficiency of the affidavit and information. Only one objection is pointed out by the appellant's counsel to the affidavit and information, and that is, it is claimed, neither of them states such jurisdictional facts as would authorize the prosecution of the appellant upon affidavit and information, or in any other mode than by indictment, for the felony where-with he was charged. In section 1679, R. S. 1881, it is provided as follows: "All public offences, except treason and murder, may be prosecuted in the circuit and criminal courts by information based upon affidavit in the following cases :

"*First.* Whenever any person is in custody, or on bail, on a charge of felony or misdemeanor, except treason and murder, and the court is in session, and the grand jury is not in session or has been discharged.

* * * * *

"*Fourth.* Whenever a public offence has been committed, and the party charged with the offence is not already under indictment therefor, and the court is in session, and the grand jury has been discharged for the term."

In the affidavit and information in this case the jurisdictional facts, if such they may be called, were charged as follows: "That the said George Hodge is not now under indictment; that the Henry Circuit Court is now in session in said county; and that the grand jury in said county is not now in session."

If it were necessary that the affidavit and information should contain a statement of the so-called jurisdictional facts, which authorize the prosecution of a person charged with the commission of a felony, in any other mode than by indictment, it would seem to us that these facts were stated in the affidavit and information, in this case, in substantial compliance with the requirements of the statute; for it was shown, both in the affidavit and in the information, that a public offence had been

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committed, that the appellant, who was charged with the offence, was not under an indictment therefor, that the proper court was in session, and that the grand jury was not in session. This showing was amply sufficient, we think, to authorize the prosecution of the appellant for the felony charged, upon affidavit and information, if any such showing had been necessary under the law. In section 1733, R. S. 1881, after giving the formal parts of an information, it is expressly provided as follows: "It shall not be necessary, in an information, to state the reason why the proceeding is by information instead of by indictment. And, in a prosecution for a felony, by information, it shall not be necessary to prove the facts showing the right to prosecute by information, unless such facts are put in issue by a verified plea in abatement." *State v. Frain*, 82 Ind. 532.

Under these statutory provisions it is very clear that the objection of appellant's counsel to the affidavit and information, in the case now before us, is not well taken, and can not be sustained. It follows that no error was committed by the court in overruling either the motion to quash the affidavit and information, or the motion in arrest of judgment. The cases of *Davis v. State*, 69 Ind. 130, *Lindsey v. State*, 72 Ind. 39, *Burroughs v. State*, 72 Ind. 334, and *State v. Henderson*, 74 Ind. 23, in which a different rule of criminal pleading was recognized and acted upon, were all decided before the criminal code of 1881 took effect and became a law, and can not now be regarded as authorities upon the question of the sufficiency of the affidavit and information. Criminal pleading is a proper subject of legislation, and the General Assembly has seen proper, as it had the right to do, to declare a different rule on the subject from that previously enunciated in the cases cited by this court.

It is claimed by the appellant's counsel that the verdict of the jury was not sustained by the evidence. A careful examination of the evidence, however, has led us to the conclusion that it was sufficient to authorize the appellant's conviction

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of the felony wherewith he was charged. The evidence was chiefly circumstantial, but the circumstances proved all tended to show the appellant's guilt. The question was one peculiarly within the province of the jury, and we can not say, either from the evidence or from the arguments of appellant's counsel, that the jury erred in their verdict of guilty. No good purpose would be subserved by setting out the evidence and commenting thereon, in this opinion. It will suffice for us to say that the jury were authorized, we think, by the evidence in the record, to find the appellant guilty. We can not disturb their verdict on the evidence.

The court instructed the jury, among other things, as to the different forms of their verdict, if they found the appellant guilty of grand larceny, or guilty merely of petit larceny; but no instruction was given as to the form of the verdict if they should find him not guilty of any offence. The appellant excepted to the instructions given, but did not ask for any additional instruction. His counsel now complains very earnestly of the omission or failure of the court to instruct the jury in regard to the form of their verdict if they should find that the appellant was not guilty of any offence. It is very clear, however, that this complaint comes too late, and can not be made available here for the reversal of the judgment. Where the trial court, through oversight or otherwise, omits or fails to instruct the jury on any such matter as the one under consideration, the party aggrieved by such omission or failure must ask the court for an instruction in relation to such matter, before he can successfully complain in this court of such omission or failure. A mere exception to the instruction given will not, as a rule, present the omission or failure as an available error for the reversal of the judgment. *Jones v. Hathaway*, 77 Ind. 14.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Maloney v. Newton *et al.*

No. 10,166.

MALONEY v. NEWTON ET AL.

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153	226
85	565
158	618
85	565
160	854

REPLEVIN BAIL.—*Contract*.—An undertaking of replevin bail is a contract.

SAME.—*Exemption*.—*Waiver*.—Where the right to the benefit of an exemption law exists by statute, it can not be waived by contract prior to the issuing of the execution.

SAME.—*Judgment in Bastardy Prosecution*.—A resident householder, who becomes replevin bail on a judgment obtained against a defendant in a prosecution for bastardy, is entitled to the benefit of the exemption law.

From the Hendricks Circuit Court.

L. M. Campbell, for appellant.

T. S. Adams, for appellees.

ELLIOTT, J.—The single question presented by this record is this: Is a resident householder, who enters himself as replevin bail on a judgment obtained against a defendant in a prosecution for bastardy, entitled to the benefit of the exemption law?

The contention of the appellees is, that the bail is bound to the same extent as the principal, and that where the principal is not entitled to the benefit of the law, the bail can not be. It is true that a replevin bail undertakes to pay the judgment according to its legal tenor and effect; thus, if the judgment replevied is payable without relief, then the bail so undertakes to pay it, and it may be collected from him without relief from valuation or appraisement laws. *Hutchins v. Hanna*, 8 Ind. 533; *Hardenbrook v. Sherwood*, 72 Ind. 403.

There is a plain and important difference between a case where one man undertakes to pay a judgment which, on its face, provides how it shall be collected, and supplies a standard for the measurement of the bail's liability, and one containing no such provision. In the one case we need look only to the face of the judgment; in the other we must look elsewhere to ascertain the character of the burden assumed by the bail.

There is, however, a more important difference between the present case and the class of cases of which those cited are

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types. The right to exemption is one which the debtor can not waive by contract. *Kneettle v. Newcomb*, 22 N. Y. 249; *Curtis v. O'Brien*, 20 Iowa, 376; *Moxley v. Ragan*, 10 Bush, 156 (19 Am. R. 61); *Denny v. White*, 2 Cold. 283. In *Maxwell v. Reed*, 7 Wis. 582, this rule is applied to a warrant to confess judgment, and it is held that a provision in the warrant waiving the benefit of the exemption can not be enforced. The principles upon which these cases proceed are, in effect, the same as those which underlie and support our own cases of *McLane v. Elmer*, 4 Ind. 239, and *Develin v. Wood*, 2 Ind. 102, wherein it is held that a debtor can not waive stay of execution. We are, it may be well to say in order to avoid possible misconception, not to be understood as intimating that a debtor may not, after execution, waive his right to the exemption; what we hold is, that where the right of exemption exists it can not be waived by contract prior to the issuing of the execution. As a debtor can not waive his exemption by contract, it follows that if the undertaking as replevin bail is to be regarded as a contract, no waiver arises from the undertaking itself. Unless the law annexes to such an undertaking the effect of a waiver of the right, there is no waiver. If a waiver exists at all it must arise by operation of law.

If we should hold with the appellee, that the bail is bound just as the principal is, then we should be forced to hold that where imprisonment is the penalty for the failure to pay the judgment, the bail may be imprisoned, and this conclusion is so palpably erroneous as not to deserve a moment's serious thought.

It can not, therefore, be justly claimed that the undertaking in itself and by force of its terms waived the benefit of the exemption law; nor can it be justly claimed that the bail is not entitled to it upon the ground that replevin bails are bound to the same extent and in the same manner as their principals.

The question comes to this: Does the law deprive one who becomes replevin bail for a defendant in a prosecution for bastardy of his exemption?

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It can not be said that one who undertakes as replevin bail for another is guilty of any wrong, no matter what may be the character of the judgment against the principal. If this be true, and we are unable to perceive any ground upon which the proposition can be impeached, it must also be true that the replevin bail can not be denied the benefit of the statute upon the ground that he has been guilty of a wrong. If, then, the bail perpetrates no wrong, he is not within the letter of the statute excluding from the benefit of its provisions one who commits a tort. What, then, is there to exclude him from asking that he be allowed that which the statute awards?

If the question were one to be controlled solely by considerations of public policy, we could not say that public policy requires that the debtor and his family should be stripped of all means of living. But the laws indicate what the sovereign power esteems true policy. It is manifest that the Constitution, and the statute enacted in aid of its provisions, mean that the householder, who is himself free from wrong, shall not lose his statutory right, and thus deprive his family of the necessities of life. It has been repeated, time and again, by the courts all over the land, that the statute is a just and humane one, intended for the benefit of a debtor's family, and always to be liberally construed. A liberal construction would certainly not exclude a replevin bail, who is himself without fault, from its provisions. A literal adherence to its language would exclude only those who have themselves done a wrong, and we need not, therefore, resort to a liberal construction to save the rights of one who is without fault. All we need do is keep straight to the words of the statute. Public policy can not overwhelm a constitutional statute, however much it may affect its construction; but, taking the language of the Constitution and of the statute as the expression of the will of the people and their representatives—and we can surely look to no higher sources for just ideas of public policy than these—enlightened public policy requires the just protection of the debtor and those dependent upon him.

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Counsel have referred us to the case of *Whiteacre v. Rector*, 29 Grat. 714 (26 Am. R. 420), wherein it is held that the exemption laws do not apply to replevin bail in criminal prosecutions, because the State is not bound by the statute, and we have found some other cases declaring the same doctrine. *Brooks v. State*, 54 Ga. 36; *Commonwealth v. Dougherty*, 8 Phila. 366; *Commonwealth v. Cook*, 8 Bush, 220 (8 Am. R. 456). On the other hand, we find cases declaring a different rule. *Green v. Marks*, 25 Ill. 204; *Hume v. Gossett*, 43 Ill. 297; *State v. Pitts*, 51 Mo. 133. We do not, however, think the question here is the same as that involved in criminal prosecutions, for there is a well defined distinction between the two classes of cases. It may well be granted that exemption can not be claimed in cases where a fine is imposed as a punishment for the violation of law, and the question before us be in no wise affected. This we say because the criminal law and the civil law are, under our system, carefully kept separate and distinct.

There are well considered cases holding that the State is bound by the statute of exemption, although not expressly named. This is decided in some of the cases already cited, and in those to be presently noticed. We have accepted the English rule that the sovereign is not bound unless expressly named, but have taken it with its exceptions, and among these exceptions, as stated in the old books, are "Statutes made for the maintenance of religion, the advancement of learning, and the good of the poor." The case of *Gladney v. Deams*, 11 Ga. 79, carries the doctrine of exemption to a very great length, holding that the right exists as against the State in cases of warrants for the collection of taxes. In the cases of *State v. Geddis*, 44 Iowa, 537, *Hume v. Gossett*, 43 Ill. 297, *Green v. Marks*, 25 Ill. 204, and *Loomis v. Gerson*, 62 Ill. 11, it is held that it applies in cases of judgments in favor of the State. In *State v. Pitts*, *supra*, it was held that the right existed in favor of a surety in a recognizance executed in a criminal prosecution. In a very recent case the question received careful in-

vestigation from the Supreme Court of the United States, and it was held that statutes exempting homesteads applied to claims held by the United States. *Fink v. O'Neil*, 106 U. S. 272. These authorities settle the question that the statute binds the State as well as the citizen.

Prosecutions for bastardy are not criminal prosecutions, but are civil proceedings. *State, ex rel., v. Brown*, 44 Ind. 329; *State, ex rel., v. Evans*, 19 Ind. 92. The undertaking of the appellant is, therefore, in a civil proceeding, and not in a criminal prosecution.

It becomes necessary to examine a little more closely the character of the appellant's undertaking; for by that his liability must be measured. It will not do, as we have shown, to affirm that his liability is in all respects the same as that of the principal. Nor do we think the cases go to any such extent. * In *Elson v. O'Dowd*, 40 Ind. 300, it is said: "In the first place, we do not think that the fact that the undertaking of a replevin bail has the effect of a judgment confessed makes the liability of the replevin bail the same as that of the judgment defendant." We can not, therefore, define the nature of the appellant's undertaking by saying that it is the same as his principal's; for this would be to give as a definition that which is not true.

It is said in some of the cases that the undertaking is a judgment confessed; and in *Vincennes Nat'l Bank v. Cockrum*, 64 Ind. 229, this doctrine was pushed to a great length—much beyond what the law warranted, and, in consequence, the case has been overruled. *Sterne v. McKinney*, 79 Ind. 578; *Vincennes Nat'l Bank v. Cockrum*, 80 Ind. 355. That the undertaking is not, in the strict sense of the term, a judgment confessed, is demonstrated in the case of *Eberwine v. State, ex rel.*, 79 Ind. 266. That it has the effect of a judgment confessed, for many purposes, is, no doubt, true; but that it is the sentence or judgment of a court is not true. The truth is that the entry of replevin bail is a statutory undertaking, voluntarily entered into by the bail.

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By undertaking as replevin bail, the bail becomes a surety. If the undertaking is not valid as a recognizance of replevin bail, because of some defect in its execution, it may be enforceable as a contract. *Sanford v. Freeman*, 5 Ind. 129. The bail is entitled to subrogation, and all similar rights of a surety. *Vert v. Voss*, 74 Ind. 565. The undertaking is founded on a consideration. *Catherwood v. Watson*, 65 Ind. 576. Release of a lien will release him as it will any other surety. *Sterne v. Bank, etc.*, 79 Ind. 549.

It is very plain from this enumeration of the elements of the undertaking of replevin bail that it is a contract. It would be preposterous to claim that one wrong-doer could become surety if the original wrong entered into his undertaking, and not much less so to insist that suretyship exists otherwise than by contract. The undertaking possesses all the essential requisites of a contract. It is what the elementary writers denominate a contract of record. 1 Chit. Con. 3. The appellee concedes that it does possess all the elements of a contract, except that of parties, and that this element is absent because the judgment creditor does not assent to the undertaking. The answer to this is that the clerk is made, in a qualified sense, the agent of the judgment creditor, to receive the bail. The case is closely analogous to the case of redemption of property from sale, of the payment of judgments, of the payment of money into a court on a tender, and in such cases, and many more of like character, the clerk is regarded as the agent, in a limited sense, it may be, of the parties.

The conclusion to which the sternest rules of logic carry us is that the liability of the appellant arises out of contract, and that he is entitled to his exemption. The result is not an evil one, for it does but bring the case within a statute which the National and State courts have, with a harmony closely approaching unanimity, proclaimed one of the wisest and most beneficent measures of modern legislation. In closing the opinion in *Fink v. O'Neil*, *supra*, MATTHEWS, J., after speaking of the statute and its operation, and explaining why it

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binds the sovereign, says that such statutes “‘shall be extended generally according to their words;’ for civilization has no promise that is not nourished in the bosom of the secure and well-ordered household.”

Judgment reversed.

No. 9095.

HANCOCK v. FLEMING ET AL.

85	571
140	205
85	571
150	435

PRACTICE.—*Record on Appeal.*—*Bill of Exceptions.*—*Affidavit and Motion.*—*Setting Aside Default.*—Under section 559 of the civil code of 1852 (section 650, R. S. 1881), an affidavit and motion to set aside a default, and the ruling of the court thereon, will not constitute a part of the record on appeal to the Supreme Court, unless they are made a part of the record by a bill of exceptions or by an order of the court.

PLEADING.—*Answer or Counter-Claim.*—*Supreme Court.*—*Partial Answer.*—Where a pleading, properly a counter-claim, is treated below by court and counsel as an answer in bar, it must be so considered by the Supreme Court; and if it purports, yet fails, to answer the entire complaint, it is bad on demurrer for the want of sufficient facts.

SAME.—*Reply.*—A bad reply is a good enough reply to a bad answer.

From the Grant Circuit Court.

G. W. Hervey, H. D. Thompson and T. B. Orr, for appellant.
A. Steele and R. T. St. John, for appellees.

HOWK, J.—This was a suit by the appellant, as payee and mortgagee, to collect a note and foreclose a mortgage executed by the appellees Jane and Charles R. Fleming. The appellees John Kelsey and Francis M. Wood were made defendants to the action; and, as to them, it was alleged in appellant's complaint, that, after the execution of the note and mortgage in suit, the mortgagors executed to them a conveyance of the mortgaged premises, in which conveyance the appellees Kelsey and Wood, as a part of the purchase-money of said premises, assumed and agreed to pay the appellant his note and mort-

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gage, which assumption and agreement were set out in the conveyance of Jane and Charles R. Fleming to their co-appellees, Kelsey and Wood, whereby they, Kelsey and Wood, became individually liable to pay the note and mortgage; and that the same were due and wholly unpaid. On the third day of September, 1879, the court rendered judgment by default for the amount due on the note, and for the foreclosure of the mortgage and sale of the mortgaged premises, etc.

Afterwards, at the same term of the court, to wit, on the 11th day of September, 1879, the appellee John Kelsey, upon his affidavit filed, moved the court to set aside the default against him, and to permit him to defend the suit, which motion was sustained and the default set aside, to which ruling and action of the court the appellant at the time excepted. The appellee Kelsey then answered in a single affirmative paragraph, to which the appellant's demurrer, for the alleged want of facts, was overruled by the court, and to this ruling he excepted. He then replied in two paragraphs, of which the first was a general denial, and the second stated special matter. Kelsey's demurrer, for the want of facts, was sustained to the second reply, and the appellant excepted to this decision. The issues joined were tried by the court, and a finding was made for the defendants, and, over appellant's motion for a new trial and his exception saved, judgment was rendered accordingly.

The appellant has assigned as errors the following decisions of the circuit court:

1. In setting aside the default and judgment as to Jane and Charles R. Fleming, and Francis M. Wood, without motion or cause therefor;

2. In overruling appellant's demurrer to John Kelsey's answer;

3. In sustaining Kelsey's demurrer to the second paragraph of appellant's reply; and,

4. In overruling appellant's motion for a new trial.

We will consider and decide the several questions pre-

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sented and discussed by appellant's counsel, and arising under these alleged errors, in the order of their assignment.

1. It is claimed by appellant's counsel that the court erred in setting aside the default and judgment in this case against Jane and Charles R. Fleming, and Francis M. Wood. The record fails to show, in any proper manner, that the appellant objected or excepted to this action of the court. Kelsey's motion to set aside the default and judgment, his affidavit upon which such motion was founded, the ruling of the court thereon, and the appellant's exception, if any, to such ruling, were not, nor was either of them, made parts of the record of this cause, either by bill of exceptions or by an order of the court; and, without such bill or order, they could not, nor could either of them, lawfully be made or become parts of the record. This was the rule under section 559 of the civil code of 1852, and it is still the rule under section 650, R. S. 1881, and it has been recognized and acted upon in many decisions of this court. *Scotten v. Divilbiss*, 60 Ind. 37; *School Town of Princeton v. Gebhart*, 61 Ind. 187; *Board, etc., of Grant Co. v. Small*, 61 Ind. 318.

We are of opinion, therefore, that the first error assigned is not so saved in the record of this cause as to present any question for the decision of this court.

2. In his answer John Kelsey alleged in substance, that he and Francis M. Wood purchased the mortgaged premises from their co-appellees, the Flemings, and received from them their warranty deed therefor; and he admitted and averred that the mortgage in suit was then a lien on said premises, that he knew of said lien when he purchased said premises, and that, as between him and the Flemings, he agreed to and did accept their deed, subject to said mortgage; but he averred that when he so purchased said premises the Flemings represented to him that the same were free and clear from any and all encumbrances except such as were set forth and named in said deed; that he relied upon such statements and representations as true; but he averred that before the Flemings became the

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owners of said premises, and before their vendor became the owner thereof, there was a valid judgment lien thereon in favor of James Forkner, Andrew F. Scott and Charles N. Elmer, in the sum of \$341.03, which was wholly unpaid; that said premises had been sold by the sheriff of Grant county, upon execution issued on said judgment, and were duly purchased by said Forkner, Scott and Elmer, who became the owners thereof; and that had he, Kelsey, known of such judgment lien (which he did not), he was unable to redeem said premises therefrom.

And the said Kelsey further averred, that after the said purchase by said Forkner, Scott and Elmer, to save himself from losing all he had paid on said premises, he was compelled to and did purchase the same from said Forkner, Scott and Elmer, by taking an assignment of their certificate of sale and procuring a deed thereon from the sheriff of Grant county; which purchase-money, with the sum he had already paid, was the full value of said premises; by means whereof, he said that he then held and owned the said premises by a superior and paramount title to the appellant's mortgage, or to any claim of title of the Flemings thereto; and that his title to the premises, under and by virtue of the lien and purchase by said Forkner, Scott and Elmer, was paramount to the lien of the mortgage in suit. Wherefore he prayed that the appellant might be decreed to pay the sum of said judgment and interest before the foreclosure of his mortgage, or, in default thereof, that he, Kelsey, might have judgment for his costs, and for other proper relief.

It seems to us that this pleading is a counter-claim or cross complaint by Kelsey against his co-defendants and the appellant, rather than an answer in bar of the appellant's action. It was treated below, however, both by court and counsel, as an answer in bar, and it must be so considered here. As such an answer, we think the facts stated therein were clearly insufficient to bar or defeat the appellant's action. It did not controvert any of the allegations of the appellant's complaint, nor

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did it confess and avoid any of those allegations. It stated simply a legal conclusion from facts which were not, but ought to have been, pleaded. It was averred in the answer that there was a judgment lien on the premises in favor of certain parties, but it was not stated when, where or against whom the judgment in question was rendered. Nor was it alleged that the judgment lien mentioned was not one of the encumbrances which, the answer admits, were set forth and named in the deed of the Flemings, and which the complaint averred that he and Wood had assumed and agreed to pay. The appellant sought in his complaint to obtain a personal judgment against Kelsey and Wood, as well as to foreclose his mortgage and sell the mortgaged premises. It was attempted, in the answer, to show that Kelsey owned and held the mortgaged premises by a title paramount to that of the mortgagors, and that, therefore, the premises in question could not be subjected to sale for the payment of the mortgage debt. This was the burthen of Kelsey's answer, but it failed to answer the alleged assumption and agreement of Kelsey and Wood to pay the mortgage debt. It may be said that the facts alleged in the answer were sufficient to show a failure of the consideration for the assumption and agreement of Kelsey and Wood to pay the appellant's note and mortgage. But it was not claimed in the answer that there had been any such failure of consideration; and certainly the facts stated did not show a total failure of consideration, and, if there were a partial failure, no correct estimate of its extent could be predicated upon the facts pleaded. From the facts and conclusions stated in his answer, it might be inferred, perhaps, that Kelsey would be entitled, upon a proper cross complaint, to some equitable relief in the premises; but no correct estimate could be made therefrom of either the kind or extent of such relief. The court erred, we think, in overruling the demurrer to Kelsey's answer.

3. Of the alleged error of the court, in sustaining Kelsey's demurrer to the second paragraph of appellant's reply, it would

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be sufficient to say, even if the reply were conceded to be bad, that it was a good enough reply for a bad answer. *Ætna Ins. Co. v. Baker*, 71 Ind. 102. We may properly add, however, that the claim intended to be asserted in this second reply, that the mortgage in suit was, in any event, a valid lien upon the inchoate interest of the wife of the judgment debtor in the mortgaged premises, has been settled adversely to the appellant's claim in the recent case of *Hudson v. Evans*, 81 Ind. 596. In that case it was held that the conveyance of land by a judgment debtor and his wife did not transfer, but extinguished, the wife's inchoate right; "or, perhaps to speak more accurately, it barred the possibility of the right becoming an absolute vested one, upon the contingency either of survivorship or of a judicial sale of the property."

4. We need not consider the alleged error of the court in overruling appellant's motion for a new trial. But we may say, without impropriety, that, while it is true that the finding of the court was not sustained by sufficient evidence, it is equally true that the evidence in the record would not have sustained a finding against Kelsey, in favor of the appellant.

The judgment is reversed, at the costs of John Kelsey, and the cause is remanded, with instructions to sustain the demurrer to the answer, and for further proceedings not inconsistent with this opinion.

No. 10,340.

SOVINE v. THE STATE.

CRIMINAL LAW.—*Affidavit*.—*Information*.—An affidavit filed as the basis of an information for larceny, in the Allen Criminal Court, in which it is stated that "said S. is now in the custody of the sheriff of Allen —, and confined in the jail of said county," sufficiently shows that S., the defendant, is in custody of the sheriff of Allen county.

85	576
126	518
85	576
130	82

Sovine v. The State.

SAME.—Larceny.—Amendments.—Supreme Court.—An information for grand larceny which fails to aver that the acts charged were done “feloniously,” is bad on motion to quash, and, though it might have been cured by amendment, the Supreme Court will not treat it as if the amendment had been made.

From the Allen Criminal Court.

S. M. Hench, for appellant.

F. T. Hord, Attorney General, *W. S. O'Rourke*, Prosecuting Attorney, and *J. Q. Stratton*, for the State.

NIBLACK, J.—This was a prosecution for grand larceny upon affidavit and information.

The affidavit, which was filed on the 23d day of April, 1881, charged Eugene Sovine with having, on the 8th day of November, 1880, at the county of Allen, and State of Indiana, feloniously stolen, taken and carried away certain United States Treasury notes, certain National Bank bills, and silver coin, of the aggregate value of \$60, the personal property of one Julius Bueche. The affidavit further charged that the said Eugene Sovine was then “in the custody of the sheriff of Allen ———, in the State of Indiana, and confined in the jail of said county, on the charge of grand larceny,” therein above set forth, and that, at no time since the said Eugene Sovine had been in custody on said charge, had the grand jury of Allen county aforesaid been in session, and that said grand jury was not then in session.

The information contained all the substantial averments of the affidavit except that it charged the defendant Sovine with having “unlawfully,” instead of “feloniously,” stolen, taken and carried away the money therein, as well as in the affidavit, described.

The defendant moved to quash both the affidavit and the information, urging as an objection to the affidavit that it did not aver that he was, at the time it was made, in the custody of the sheriff of *Allen county*; and as an objection to the information, that it did not allege that the money had been

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“feloniously” stolen, taken and carried away, within the meaning of the statute defining the crime of grand larceny. Acts 1877, Reg. Sess., p. 63. His motion was, however, overruled, both as to the affidavit and information. A jury found the defendant guilty as charged, assessing a fine of \$30 against him, and fixing his term of imprisonment at three years in the State’s prison.

The act of March 29th, 1879, providing for the prosecution of felonies by affidavit and information, enacts that any one charged with a crime of that class may be so prosecuted:

“*First.* When any person is in custody on a charge of felony, and no grand jury is in session.” Acts 1879, p. 143.

We think the affidavit, taking all its parts together, made it sufficiently apparent that the defendant was “in custody” on the particular charge of felony preferred against him, at the time it was filed, and that hence the court did not err in refusing to quash the affidavit. Independently of the defect relied upon by the defendant, the averment that he was “confined in the jail of said (Allen) county” on that charge was quite sufficient. *Davis v. State*, 69 Ind. 130.

In referring to that part of the indictment which is devoted to the description of the offence intended to be charged, Chitty on Criminal Law says: “There are certain terms which are usually inserted in the part of the indictment we are now examining, which mark out the color of the offence with precision, and which are absolutely necessary to determine the judgment. Thus every indictment for *treason* must contain the word ‘traitorously’; every indictment for burglary, ‘*burglariously*’; and ‘*feloniously*’ must be introduced in every indictment for felony, and these words are so essential, that if the word *feloniously* be omitted in an indictment for stealing a horse, it will be only a trespass, or a misdemeanor of which the defendant may be convicted under such indictment.” 1 Chitty Crim. Law, 242.

If a misdemeanor be not included in the description of the felony charged, and the word “feloniously” be omitted, the

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indictment is insufficient for any purpose, and must be so held whenever the question of its sufficiency is properly presented. Moore Crim. Law, section 167, and authorities there cited; 1 Bishop Crim. Procedure, section 534.

As to its material allegations, an information stands upon the same footing with an indictment, and must be tested by the same rules of criminal pleading when a question is made upon its sufficiency. *Lindsey v. State*, 72 Ind. 39.

An information may be amended so as to make it conform to the affidavit upon which it is based, and in this way radical defects in the information may be cured, where the offence is well charged in the affidavit; but where the sufficiency of the information is challenged it must be judged by what it contains, and not by what it might have been made to contain by some admissible amendment. Acts 1879, p. 144, sec. 3; R. S. 1881, sec. 1735.

Tested, therefore, by the statutory definition of the crime of grand larceny, as well as by the well recognized rules of criminal pleading, the information in this case charged no indictable offence of any kind, and, for that reason, the motion to quash it ought to have been sustained.

Counsel for the State argue that, as the defect in the information was one which might have been readily amended in the court below, we ought to regard the amendment as having been made, and to treat the information as having been sufficient upon demurrer.

There is a class of merely clerical mistakes, and of variances and discrepancies, usually developed at the trial of a cause, and not going to the merits of the action, and concerning which courts are accustomed to permit amendments without any serious question, which this court is in the habit of disregarding and treating as having been amended in the court below; but this liberality of construction does not extend to cases like this, where the information, being materially defective, was held good upon a motion to quash, and where the trial

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afterwards proceeded without amendment. *Buskirk's Practice*, 337; *Keiser v. State*, 78 Ind. 430; *Dyer v. State*, ante, p. 525.

The court erred in refusing to quash the information, notwithstanding the sufficiency of the affidavit. *Davis v. State*, supra.

The judgment is reversed, and the cause remanded for further proceedings.

The clerk will give the proper notice for the return of the appellant to the sheriff of Allen county.

No. 10,604.

FEIGEL v. THE STATE.

CRIMINAL COURT.—*Absence of Regular Judge.*—*Appointment of Special Judge.*

—The provisions of section 1381, R. S. 1881, are applicable to criminal courts as well as to civil courts; and where the regular judge of a criminal court fails to appear during term for a period of three days, it is competent for the proper county officers to elect a competent and reputable attorney to act and preside as judge of such court until the return of the regular judge.

CRIMINAL LAW.—*Indictment.*—*Surplusage.*—Where an indictment contains a sufficient charge of a public offence, mere surplusage will not vitiate such indictment.

SAME.—*Intoxicating Liquors.*—*Evidence.*—*Instructions.*—Where the evidence shows that the defendant, not being licensed to retail intoxicating liquors, sold the prosecuting witness "one drink" of whiskey, and there was no evidence that "one drink" was less than a quart, there was no error in refusing to instruct the jury that the defendant could not be found guilty. In such case the court's instruction to the jury, that before they could convict they must find, beyond a reasonable doubt, that the quantity sold was less than a quart, is a correct statement of the law applicable to the evidence.

From the Allen Criminal Court.

S. M. Hench, for appellant.

F. T. Hord, Attorney General, *C. M. Dawson*, Prosecuting Attorney, and *W. B. Hord*, for the State.

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Howk, J.—In the record of this cause, under date of the 28th day of August, 1882, there appears an appointment in writing, signed by the judge of the court below, in substance as follows:

“I, Warren H. Withers, Judge of the Criminal Court of Allen County, being seriously ill and unable to attend and hold said court, do hereby appoint the Hon. Edward O’Rourke, Judge of the Allen Circuit Court, to act as judge of and hold said court for me and in my stead, until further orders.

“August 28th, 1882.”

Thereupon Judge O’Rourke appeared and presided, pursuant to such appointment, as judge of the court below; and the grand jury, theretofore empanelled and sworn, came again, and, after receiving a further charge from the court, retired to their room, in charge of a sworn bailiff, to deliberate upon such matters as might lawfully come before them.

Afterwards the record shows that, on September 6th, 1882, Judge Warren H. Withers being present and presiding, the grand jury returned into open court, among others, an indictment against the appellant, charging him with an unlawful sale of intoxicating liquor, in a less quantity than a quart at a time; and, by order of the court, a bench warrant was issued for appellant’s arrest.

The record contains another appointment of Judge O’Rourke by the judge of the criminal court, to hold the court; but it does not appear that anything was done in this case while Judge O’Rourke was presiding under that appointment. It is then shown that, on the 21st, 22d and 23d days of September, 1882, there was no judge present to hold the court, and that, for that cause, the court was adjourned from day to day until the 25th day of September, 1882. On that day, Judge Withers being absent and unable to hold the court, on account of sickness, the clerk and sheriff of the court and the auditor of the county appointed, in writing, the Hon. Edward O’Rourke, judge of the 38th judicial circuit, to hold the court during the absence and inability of Judge Withers to attend

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and hold the court. Under this appointment Judge O'Rourke appeared and presided in the court below during the trial of this cause.

On appellant's arraignment and plea of not guilty, the issues joined were tried by a jury; and a verdict was returned finding him guilty as charged, and assessing his fine in the sum of \$20. Over his motion for a new trial judgment was rendered on the verdict.

By several assignments of error, the appellant has called in question the right and capacity of the Hon. Edward O'Rourke to preside and hold the Allen Criminal Court, as judge thereof, under either of his appointments as such judge. The power of Judge Withers, the regular judge of the court, to appoint the judge of another court to hold his court during his sickness, may well be questioned, as it seems to us; but the question is one which we do not find it necessary for us to consider or decide in this case, and, therefore, we do not decide it. It may be assumed from the record of this cause, that Judge Withers presided in the court below when the grand jury were empanelled and sworn, and when they returned into open court the indictment against the appellant; and it does not appear that any proceedings were had in this case before Judge O'Rourke while he was holding court under his appointment from Judge Withers. The validity of that appointment, therefore, is not a material question in this case.

The record shows that during the trial of this cause Judge O'Rourke was presiding in and holding the court, under his appointment as judge by the clerk, sheriff and auditor of the county. Were these county officers unauthorized by law to make such appointment? This is the question we are required to decide. It is manifest, we think, that in making such appointment the county officers were acting under the provisions of section 1381, R. S. 1881. In this section it was provided as follows:

"If during any session of court, by reason of death, sickness, or other casualty, any judge shall be prevented from pre-

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siding, so that the court will lapse; and if at any term of court the judge shall fail to attend, or during the term shall fail to appear for any period of three days,—the sheriff may adjourn the court from day to day. And on failure to so appear during the term, the clerk, sheriff, and auditor (and in case of the absence of either, either two, with the recorder of the county) may elect any competent and reputable attorney to act as judge; who, if he accept, shall qualify as other judges, and his appointment, with the reason therefor, and his oath shall be spread on the order-book. And such judge, so selected, may preside until the return of the regular judge, or in case of death, until his successor be named. And in any case of vacancy during term, or if the judge be required to be absent during term, such appointment may be made until a successor shall be named by the proper authority.”

It will readily be seen that this section is broad enough in its provisions to cover the case now under consideration. The record of this case shows that, during the April session, 1882, of the court, the regular judge thereof was prevented, by reason of sickness, from presiding therein; that, on account of his sickness, the judge failed to appear for the purpose of holding court during that term, for a certain period of three days; and that, during that period of three days, the sheriff had adjourned the court from day to day. It was further shown that, after such failure of the judge to appear during the term for such period of three days, the clerk, sheriff and auditor of the county appointed Judge O'Rourke to act as judge of the court. His appointment was surely legal and valid; therefore, unless it can be correctly said that the section of the statute is not applicable to the appointment of a judge of a criminal court. This is the precise point which the appellant's learned counsel has presented and insisted upon, with much earnestness, in his elaborate brief of this cause. The question is by no means free from difficulty. The section quoted is section 261 of the act of April 7th, 1881, entitled “An act concerning proceedings in civil

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cases.” It is argued that it is clear from the title of the act, that the section of the act can only have reference to the judges of civil courts, and can not be construed as providing for the appointment of judges of criminal courts. This argument seems to us specious and unsound. It proves too much. It means, if carried to its logical result, that an appointed judge of a circuit court could only hold the court for the trial of strictly civil cases; and this, certainly, was not the intention of the Legislature in the enactment of the section quoted. On the contrary, we think it was the intention of the law-making power to provide, in this section, that no court should lapse by reason of the absence of the regular judge, and that the appointed judge should have power to hold the court for the trial of all causes, criminal as well as civil, pending therein.

In all the counties of this State, except Allen and Marion, the circuit court has jurisdiction of criminal as well as civil cases; and it is clear, we think, that the appointed judge of any such court could hold the same for the trial of any cause pending therein. It can not be that the Legislature intended to provide that appointed judges should have power to hold courts merely for the trial of civil cases, and not of criminal causes. On the contrary, it must be held that the legislative intent is shown in the language of the section quoted, that no court should lapse by reason of the non-attendance or non-appearance of the regular judge of the court. In this respect the provisions of the act are broad enough to embrace all courts, both criminal and civil; and we are not required to limit the plain language of the section quoted by judicial construction. Indeed, we think that public interests will be subserved by a liberal construction of the section quoted. Our conclusion is that the appointment of Judge O'Rourke by the county officers, to hold the court below, was a valid and legal appointment, and that the trial of the appellant before him as judge of the court, under such appointment, was a legal and valid trial.

The indictment was sufficient. It charged that the appel-

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lant, not being licensed according to the laws of this State, unlawfully sold intoxicating liquor in a less quantity than a quart at a time, to a certain person, for a certain price. This was a sufficient charge of a public offence, the time and place having been given. The indictment contained some surplusage, but it is well settled that mere surplusage will not vitiate that which is otherwise good. The motion to quash the indictment was, we think, properly overruled.

It is insisted that the court erred in refusing to instruct the jury, at appellant's request, "That the jury must find, before they can convict the defendant, that 'one drink' of whiskey was a less quantity than a quart; and if there is no evidence to show that 'one drink' of whiskey was a less quantity than a quart, the defendant could not be found guilty." The court refused this instruction, but, of its own motion, charged the jury that they must find, beyond a reasonable doubt, that the quantity of intoxicating liquor sold was less than a quart, before they would be authorized to convict. Upon the record before us it is clear that the court, in refusing to instruct the jury as appellant requested, committed no error available for the reversal of the judgment. The motion for a new trial was correctly overruled.

We have found no error in the record which requires the reversal of the judgment.

The judgment is affirmed, with costs.

No. 10,583.

THE STATE v. MADDUX.

CRIMINAL LAW.—*Pleading*.—In charging malicious trespass (R. S. 1881, sec. 1955), the acts charged need not be alleged to have been done "unlawfully."

From the Blackford Circuit Court.

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The State v. Maddox.

F. T. Hord, Attorney General, *C. W. Watkins*, Prosecuting Attorney, and *J. Noonan*, for the State.

NIBLACK, J.—This was a criminal prosecution commenced before a justice of the peace upon an affidavit, the body of which was as follows:

“Sidney R. Patterson, upon his oath, says, that, on or about the 22d day of October, 1881, in the county of Blackford, in the State of Indiana, one James J. Maddox did then and there feloniously and maliciously injure, tear down and destroy a rail fence then and there the property of the said Sidney R. Patterson, to the damage of said property in the sum of \$50.”

The defendant was tried and convicted before the justice. He then appealed to the circuit court, where, upon his motion, the affidavit was quashed and he was discharged.

The State has appealed to this court, and assigned error upon the decision of the circuit court quashing the affidavit. We have no brief from the appellee, and hence no suggestion from him as to any defect in the affidavit; but counsel for the State inform us that the court sustained the motion to quash, because the affidavit did not state that the alleged injury to the fence was “unlawfully,” as well as *maliciously*, inflicted.

The statute upon which this prosecution was based is as follows:

“Whoever maliciously or mischievously injures or causes to be injured any property of another or any public property is guilty of a malicious trespass, and, upon conviction thereof, shall be fined not more than twofold the value of the damage done, to which may be added imprisonment in the county jail for not more than twelve months.” R. S. 1881, section 1955.

Chitty, in his work on Criminal Law, in referring to the class of offences to which the one charged in this case belongs, says: “The term, ‘*unlawfully*,’ which is frequently used in the description of the offence, is unnecessary, wherever the crime existed at common law, and is manifestly illegal. So it has been adjudged, that it need not be used in an indictment

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for a riot, because the illegality is sufficiently apparent, without being expressly averred. But if a statute, in describing an offence which it creates, uses the word, the indictment founded on the act will be bad, if it be omitted; and it is, in general, best to insert it, especially as it precludes all *legal* cause of excuse for the crime." 1 Chitty Crim. Law, 241; 1 Bishop Crim. Procedure, section 503; Moore Crim. Law, section 168; *State v. McClure*, 4 Blackf. 328. Neither is it necessary to add the term "unlawfully" to the description of an alleged offence where enough is shown to make it manifestly illegal. 3 Chitty Crim. Law, 1042; *State v. Murphy*, 21 Ind. 441.

As to the affidavit before us, it may be said:

First. That the statute creating the offence, charged by it, does not use the term "unlawfully" in its description of the offence which it creates, and that, as the statutory description is quite complete without the use of that term, its omission from the affidavit was immaterial.

Secondly. That the language used in describing the offence made it sufficiently manifest that the injury charged was "unlawfully" inflicted.

It has been several times adjudged by this court that the term "feloniously," when used in the connection in which it is found in the affidavit in this case, is the equivalent of the word "unlawfully." Moore Crim. Law, section 167; *Greer v. State*, 50 Ind. 267 (19 Am. R. 709); *Shinn v. State*, 68 Ind. 423; *Hays v. State*, 77 Ind. 450.

In our opinion, therefore, the court erred in quashing the affidavit. *State v. Clevinger*, 14 Ind. 366; *State v. Williams*, 21 Ind. 206; *Payne v. State*, 74 Ind. 203.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Plant *et al.* v. Edwards.

No. 9691.

PLANT ET AL. v. EDWARDS.

DEMURRER TO EVIDENCE. — *Practice.* — *Dismissal.* — The general denial and affirmative defences being pleaded, the plaintiff, after both parties had put in evidence and rested, demurred to the evidence, and the court compelled the defendants to join in the demurrer. The demurrer was overruled, and then the plaintiff was permitted to dismiss his suit.

Held, that the demurrer was wholly unauthorized.

Held, also, that no judgment could properly be rendered upon it.

Held, also, that there was no error in permitting the plaintiff to dismiss his cause.

From the Superior Court of Cass County.

D. P. Baldwin, D. D. Dykeman, D. B. McConnell, R. Magee and S. T. McConnell, for appellants.

D. C. Justice, for appellee.

BLACK, C.—The appellee sued the appellants, with others who refused to join in this appeal.

The defendants answered by general denials, and some of them by additional paragraphs of special defence.

On the trial, after evidence had been introduced on both sides, and the parties respectively had rested, the plaintiff, it is said in the record, demurred to the evidence. Leave was given him to file the demurrer, and the jury was discharged, the defendants objecting. The defendants, having been ruled, over their objection, to join in the demurrer, which set forth the evidence on both sides, did so.

The court overruled the demurrer, and the plaintiff, having excepted to this ruling, moved to dismiss the cause. Pending this motion, the defendants moved for judgment in their favor, on the overruling of the demurrer. This motion was overruled, and thereupon the court sustained the plaintiff's motion, dismissed the cause, and rendered judgment in favor of the defendants for costs. The defendants then moved the court to set aside the judgment of dismissal, and to render judgment in their favor on the demurrer to the evidence. This motion was overruled.

The appellants present for our decision the action of the court in sustaining the motion to dismiss the cause, and in refusing to render judgment for the defendants upon the demurrer to the evidence. There is no brief for the appellee. The code of 1852, sec. 363, provided, as does sec. 333, R. S. 1881, that an action may be dismissed without prejudice, by the plaintiff, "before the jury retires; or, when the trial is by the court, at any time before the finding of the court is announced." After providing when the action may be dismissed by the court, the section concludes: "In all other cases, upon the trial the decision must be upon the merits."

The practice of demurring to the evidence has not been encouraged by the courts. The proceeding is hazardous for the demurrant, and, though it has been allowed in this State, it has not been much resorted to here or in other jurisdictions, which fact may account to some extent for the frequent misapprehension by attorneys of the purpose of the proceeding. It has no place in our criminal practice. *Miller v. State*, 79 Ind. 198. We need not determine, in this case, what effect, if any, upon the right to demur in civil actions, results from the absence from the civil code of 1881 of a provision similar to that of section 802 of the civil code of 1852, by which the laws and usages of this State relative to pleadings and practice in civil actions and proceedings not inconsistent with the code of 1852, and, so far as the same might operate in aid thereof, or to supply an omitted case, were continued in force.

It is no part of the object of proceedings upon demurrer to evidence "to bring before the court an investigation of the facts in dispute, or to weigh the force of testimony or the presumptions arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is to refer to the court the law arising from facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts." *Fowle v. Common Council of Alexandria*, 11 Wheat. 320. "The matter of fact being confessed,

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the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record will remain for the decision of the judges." *Gibson v. Hunter*, 2 H. Bl. 187, 208. "The court is not by the demurrer substituted for the jury, whose duty it is to weigh the testimony." *Davis v. Steiner*, 14 Pa. St. 275. "By this proceeding, the issue in fact, closed to the jury, is exchanged for an issue in law; and on the determination of this latter issue, either way, judgment follows, as it would have done, on a verdict found for the same party, on the issue in fact." Gould Pl., ch. 9, pt. 2, section 47.

The court does not, in such proceedings, perform the functions of a jury. The facts are admitted, and the court applies the law to them and determines which party to the issue should succeed upon such facts. The decision upon the demurrer is a decision upon the facts shown by the evidence, and, like the decision upon a demurrer to the complaint, is purely a matter of law. It "can not involve any questions of fact on the evidence." *Copeland v. New England Ins. Co.*, 22 Pick. 135; *Gibson v. Hunter*, *supra*. "Indeed, the case made for a demurrer to evidence, is, in many respects, like a special verdict." STORY, J., in *Fowle v. Common Council of Alexandria*, *supra*.

Instead of instructing the jury as to the law, and leaving the law to be applied by the jury to the facts found by them from the evidence, the court discharges the jury, and, without finding the facts from the evidence as this is done by a jury, or by the court when it tries the cause acting as a jury, the court applies the law to admitted facts, all the facts shown by the evidence and all that the evidence conduces or tends to prove being taken by the court, without weighing probabilities, as being admitted.

In *Golden v. Knowles*, 120 Mass. 336, it was said, in speaking of a demurrer to evidence: "One of the effects of a demurrer is, that it admits all the facts which the evidence of the plaintiff tends to prove; another is, that if the demurrer

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is overruled, the plaintiff is entitled to judgment." In *Commonwealth v. Parr*, 5 W. & S. 345, where the Commonwealth had joined in the defendant's demurrer to the evidence, and judgment upon the demurrer had been rendered for the defendant, the appellate court, in reversing the judgment, itself rendered judgment against the defendant and remitted the record to the court below that it might pass sentence on him. So, in *Davis v. Steiner*, *supra*, the appellate court, in reversing the judgment of the court below, which was in favor of the defendant on his demurrer to the evidence, gave judgment for the plaintiff. In *Griggs v. Seeley*, 8 Ind. 264, in reversing a judgment which had been rendered in favor of the defendant, who had demurred to the evidence, this court remanded the cause, with instructions to enter judgment for the plaintiff. In *Fouch v. Wilson*, 60 Ind. 64 (28 Am. R. 651), the defendant's demurrer to the evidence had been sustained, and this court instructed the court below to overrule the demurrer to the evidence, and to render judgment thereon in favor of plaintiffs. See, also, *Louthain v. Fitzer*, 78 Ind. 449.

It would seem to follow from all the foregoing authorities, that where a demurrer to evidence has been properly tendered, in a case where it might properly be allowed, and it has been decided against the demurrant, the issue has been determined against him on its merits, and he should not afterward be permitted to dismiss the cause.

In the case now to be decided, each party introduced oral and written evidence. The record sets out all the evidence in the form of a bill of exceptions signed by the judge. The following addition thereto is signed by plaintiff's attorney:

"And this being all the evidence given in the cause, the plaintiff says that the evidence of the defendants is not sufficient to maintain their defence to the plaintiff's cause of action, and, therefore, he demurs thereto and prays that the defendants may be required to join in this demurrer; and he admits the written evidence and all the facts proven by the witnesses hereinbefore set out, and any inference and conclu-

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sion the jury might rightfully and reasonably draw therefrom, and he prays judgment."

Upon demurrer to evidence, the demurrant can not make admissions in his own favor and thereby have them influence the determination of a dispute as to facts. Facts favorable to the demurrant can not thus be put in the balance against facts favorable to his adversary. The demurring party can not by his demurrer "cause his own evidence to be taken for true, and the court can not, without usurping the province of the jury, decide upon its truth." *Woodgate's Adm'x v. Threlkeld*, 3 Bibb, 527. And if he wishes to set up any facts in his favor he must resort to the jury to have them established. *Copeland v. New Eng. Ins. Co.*, *supra*. His evidence can not be considered. *Fritz v. Clark*, 80 Ind. 591, and authorities cited; *Davis v. Steiner*, *supra*; *Jones v. Ireland*, 4 Iowa, 63; Gould Pl., ch. 9, pt. 2, sec. 53; *Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300; *Ruff v. Ruff*, *ante*, p. 431.

In *Gibson v. Hunter*, *supra*, the defendants demurred to the evidence, and the plaintiff joined. Judgment upon the demurrer was rendered in favor of the plaintiff. Upon writ of error it was held that, without the distinct admission by the defendants upon the record of every fact and every conclusion which the evidence given by the plaintiff conduced to prove, it was not competent for the defendants to insist upon the discharge of the jury from giving a verdict, and to oblige the plaintiff to join in the demurrer, and that no judgment could be given upon such a demurrer. It was said that there could be no manner of certainty in the state of facts upon which any judgment could be founded. Therefore, a *venire de novo* was awarded. In *Fowle v. Common Council of Alexandria*, *supra*, at the trial upon the general issue, both parties introduced evidence. The defendants demurred to the evidence, and the record contained the whole evidence. The judgment on the demurrer was in favor of the defendants. In reversing this judgment it was said by STORY, J.: "When the demurrer was so framed as to let in the defendant's evidence, and thus to rebut

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what the other side aimed to establish, and to overthrow the presumptions arising therefrom, by counter presumptions, it was the duty of the circuit court to overrule the demurrer, as incorrect, and untenable in principle. The question referred by it to the court, was not a question of law, but of fact. * * Under such a predicament, the settled practice is, to award a new trial, upon the ground that the issue between the parties, in effect, has not been tried." And a *venire de novo* was awarded. The words "to overrule" are used by the learned judge in the sense of to annul, to set aside.

In *Jones v. Ireland, supra*, where the defendant, by demurrer to evidence, sought to withdraw a question from the jury which was proper to be decided by the jury, and to submit the decision thereof to the court, making a case where the plaintiff could not have been required to join in the demurrer, the presumption in his favor to be drawn from the evidence not being admitted by the defendant, the appellate court, in reversing the judgment, which was in favor of the defendant, said that where the plaintiff is not bound to join in the demurrer, if he does so, the court can pronounce no judgment upon the demurrer; and the judgment was set aside, and a *venire de novo* was awarded.

No joinder in demurrer can be required while there is any matter of fact in controversy between the parties. 4 Phillipps Ev. 784, and authorities cited.

The plaintiff, appellee, sought to withdraw from the jury, and to refer to the court, the determination of what was within the jury's province. There was still a controversy of fact. His admission included his own evidence, as well as that of his adversary. The burden of proof was upon the demurrant, and, in the absence of his own evidence, no evidence was needed for the determination against him of the issue of fact. Without evidence in support of the plaintiff's cause of action, there was nothing to defend against. In such a case the court is inevitably bound not to decide in favor of the plaintiff, and

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there is no opportunity for the determination of the merits of the issue.

The demurrer was wholly irregular and incorrect, and untenable in principle, a thing without reason or authority in its favor.

It was error to require the defendants to join in the demurrer, but they have not presented that error in this court. No judgment could rightfully be rendered upon such a demurrer. We will presume that this was the view taken by the court below.

After the demurrer had been overruled, the merits of the issue remained untried and undecided, and no final judgment could properly be rendered. Under such circumstances it was not error to permit the plaintiff to dismiss the cause.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it hereby is affirmed, at the costs of appellants.

Petition for a rehearing overruled.

No. 9604.

CANDY, EXECUTOR, v. COPPOCK.

DECEDENTS' ESTATES.—*Claims.—Statute of Limitations.—Practice.—Pleading.*
—*Act of February 4th, 1881.*—Under the provisions of the act of February 4th, 1881 (Acts 1881, p. 20), until September 19th, 1881, the statute of limitations must have been pleaded to a claim against a decedent's estate, as in a civil action.

MARRIED WOMAN.—*Contract for Services.*—An agreement by a married woman to pay an attendant for services is void, and can not be enforced, although it was acknowledged by her after the death of her husband. An acknowledgment of an agreement does not constitute a promise to pay.

From the Grant Circuit Court.

J. L. Custer, for appellant.

A. Steele and G. W. Gibson, for appellee.

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FRANKLIN, C.—Appellee filed a claim in the Grant Circuit Court against appellant, as executor of the estate of Nancy Russell, deceased. Appellant answered by a denial only. Verdict for appellee, with answers to interrogatories. Motion for a new trial overruled, and motion for judgment for appellant on answers to interrogatories overruled, and judgment rendered on the verdict. The errors assigned are the overruling of the motions for a new trial and for judgment on the answers to the interrogatories. The reasons for a new trial are, that the damages are excessive, and the verdict is not sustained by sufficient evidence. The claim is for services from 1854 to November 8th, 1879, and a few items of personal property, amounting in all to \$1,347; the verdict was for \$1,000. The evidence shows that appellee, when she was a girl about sixteen years old, went to live with said Nancy Russell, who was then married, and continued to live with her the most of the time until appellee married, in 1872, and after that time continued occasionally to work for her; that her services before she was married were worth from \$1 to \$1.50 per week, and that after she was married, in time of deceased's sickness, were worth from half a dollar to \$5 per day; that while deceased was sick, upon two or three occasions, third parties, under the direction of deceased, had taken of her money and paid appellee half a dollar or more for work that she had then done. Deceased's husband died in the spring of 1872, and appellee married in the fall of 1872. Deceased died in November, 1879. Deceased, while married, had agreed to pay appellee for her services, and, after the death of her husband, had admitted that she owed appellee, and said she would not pay her while appellee's husband remained as he was; but, after the death of deceased's husband, deceased had promised appellee that she should be well paid for her services in thereafter waiting on deceased while sick. The jury, in answer to interrogatories, stated that the services were worth \$1,000; that a part of said services, amounting to \$426 worth, were rendered within six years prior to the filing of the claim; that

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deceased was a married woman when the agreement for the payment of the other services was made, but the agreement was acknowledged by her after the death of her husband. Under these answers it is insisted by appellant that appellee could not recover for the services rendered in the lifetime of the husband, and if entitled to recover anything, could only recover for such services as were rendered within six years prior to the filing of the claim; and that the motion for judgment for appellant on the answers to the interrogatories, notwithstanding the general verdict, ought to have been sustained. This cause was tried on the 3d day of May, 1881, and judgment rendered therein on the 10th day of May, 1881. As to whether the appellant can avail himself of the statute of limitations without pleading it, depends upon the statute in force and applicable at the time of the trial. In the trials of claims against estates prior to February 4th, 1881, it has been repeatedly held by this court, that, under the evidence, the statute of limitations may be enforced without specially pleading it. *Niblack v. Goodman*, 67 Ind. 174 (see opinion on petition for a rehearing); *Parker v. Siple*, 76 Ind. 345. The same result will follow in trials of like claims had after September 19th, 1881, the time when the revision of 1881 went into force; but between the 4th day of February, 1881, and the 19th day of September, 1881, there was a statute in force, entitled "An act concerning the allowance of claims against decedents' estates," approved February 4th, 1881, which provided, that if the claim against the decedent's estate was not admitted as therein provided for, "the same shall be transferred to the issue docket of such court, and shall stand for trial at the next term thereof, as other civil actions pending therein." Acts 1881, p. 20. There has been a judicial construction placed upon this statute by this court, by which it has been held that it regulates and controls the manner or mode of the trial, and not merely the time when the claim shall stand for trial; and that in such cases special defences must be pleaded the same

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as in other civil suits pending. *Jennings v. McFadden*, 80 Ind. 531. Therefore, the question of the statute of limitations can not be considered in this case. The agreement made with decedent while she was a married woman was void, and can not be enforced. The question as to whether a promise, made by a *feme sole* to pay a debt created while she was a *feme covert*, is supported by a sufficient moral obligation to make the promise binding, it is unnecessary to decide, and we do not decide it in this case, for the reason that the evidence does not show that any such promise was made. An acknowledgment of an agreement does not constitute a promise to pay.

The answers to the interrogatories show that there was due the appellee for services rendered within six years prior to the filing of the claim, the sum of \$426. These services were rendered for the deceased after she became a *feme sole*, and under a promise then made to pay for the same, which created a liability against her estate, and there was no error in overruling the motion for judgment in favor of appellant upon the answers to the interrogatories. The answers clearly show that appellee was entitled to recover the said sum of \$426; and the evidence as clearly shows that the greater part of the \$1,000, returned by the jury in favor of appellee, was for services rendered while deceased was a married woman; and to that extent we think the damages are excessive, and that, unless such excess be remitted, a new trial ought to be granted.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that if a remittitur for \$574 of the judgment of the court below be filed in this court within sixty days, the balance of the judgment be and it is in all things affirmed, at appellee's costs; otherwise that it be and is in all things reversed, and that the cause be remanded, with instructions to grant a new trial, and for further proceedings.

Oliver v. Gorham.

No. 10,101.

OLIVER v. GORHAM.

PLEADING.—*Complaint.—Common Count.—Account.*—A complaint upon an account, in the general form of the common count formerly in use, if accompanied by a proper bill of particulars, is good on demurrer, under the code.

From the Lagrange Circuit Court.

W. C. Glasgow, J. S. Drake, F. D. Merritt and O. S. Ballou,
for appellant.

A. A. Chapin, for appellee.

NIBLACK, J.—Action by Emma Gorham and her husband, Lewis Gorham, against Robert J. Oliver, upon an account. The complaint was in two paragraphs, but as the second paragraph was withdrawn before the cause was given to the jury, no question is presented upon it in this court.

The first paragraph averred that the plaintiffs were married to each other; “that the said Robert J. Oliver became indebted to the said Emma Gorham while she was yet Emma Evans, for work and labor done for him, for care and attention bestowed upon his minor child Mattie, and upon his wife, Catharine Oliver, during their last sickness, and for which the defendant agreed to pay a reasonable compensation, for money loaned, paid out and expended for him and his minor child Mattie, all at his special instance and request, and as appears more fully by a bill of particulars filed herewith and made a part of this complaint, marked ‘Exhibit A’; that said indebtedness is now due and unpaid. Wherefore the plaintiffs ask judgment for \$336, the amount of said claim, and for all other proper relief.”

A bill of particulars, amounting to \$336 in the aggregate, was filed with and accompanied this paragraph. A demurrer to this first paragraph being first overruled, the action as to the husband, Lewis Gorham, was dismissed, and afterwards continued in the name of the wife, Emma Gorham, alone. Issues being joined, a jury returned a verdict for the plaintiff, assessing her damages at the sum of \$100, and judgment was rendered accordingly.

Somers v. Somers et al.

The first complaint made here of the proceedings below is that the court erred in overruling the demurrer to the first paragraph of the complaint set out as above.

The objection urged to the paragraph is that the contract under which the alleged services were rendered was not set out and described with sufficient certainty, and that it was defective in not averring by whom the work and labor was performed, and the money was loaned, paid out and expended. The appellee might very properly have been required to make the paragraph more certain and specific in some respects, but the bill of particulars supplied some of the omissions complained of, and, considering the paragraph in the nature of a common count in assumpsit, aided as it was by the bill of particulars filed with it, we think it was sufficient upon demurrer. 2 Chitty Pleading, 33.

Other questions are suggested by counsel, but they are neither presented nor argued in such a way as to require us to consider them, only a preliminary or supersedeas brief having been filed on behalf of the appellant.

The judgment is affirmed, with costs and ten per cent. damages.

No. 9927.

SOMERS v. SOMERS ET AL.

EVIDENCE:—Hearsay.—Title to Personal Property.—In an action by A. against B. to try the title to property levied upon as the property of C., to satisfy a judgment recovered against C. by B., it is error to allow B. to prove that C., who was not a party to the suit, claimed the property, as such statement, in the absence of A., was mere hearsay.

From the Marshall Circuit Court.

W. B. Hess, for appellant.

M. A. O. Packard and *O. M. Packard*, for appellees.

BEST, C.—Isaac Somers recovered a judgment against one Joshua Somers before a justice of the peace, and caused execution to issue thereon, with which Enoch F. Powers, constable,

Somers v. Somers *et al.*

levied upon certain personal property as the goods of Joshua Somers. The appellant claimed the property, and brought this action before said justice to try the title to such property. The cause was tried before the justice, appealed to the circuit court, there tried, a finding made, and, over a motion for a new trial, judgment was rendered for the appellees.

The appellant assigns as error the order of the court in overruling the motion for a new trial. Among the reasons embraced in the motion for a new trial, it was insisted that the court erred in allowing the appellees to prove that Joshua Somers claimed to be the owner of the property.

Joshua Somers had owned the property, but the appellant claimed that she purchased it of him in February, 1879, more than a year before the rendition of the judgment, and offered testimony tending to establish this fact. The appellees then called a witness who, over the objection of appellant, was permitted to state that Joshua Somers "claimed" the property until about the time the cause was tried before the justice. This was error. Joshua Somers was not a party to the action, and his statements were not admissible in evidence against the appellant. They were not made in the appellant's presence, and were mere hearsay. *Meyer v. Bell*, 65 Ind. 83; *Kennedy v. Divine*, 77 Ind. 490.

This claim was not a statement in disparagement of his title, and, therefore, was not admissible on that ground. In addition to this, the statement itself was not given, but merely the substance of what was said. This was wrong, and as we can not say that this testimony did not injure the appellant, its admission must reverse the case.

This conclusion renders it unnecessary to determine whether the finding was supported by the evidence, and upon that question we express no opinion. ♦

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellees' costs, with instructions to grant a new trial.

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No. 10,483.

PEACHER v. THE STATE.

SUPREME COURT.—*Criminal Law.—Evidence.*—The Supreme Court will reverse a judgment of conviction in a criminal case when the evidence in the record is totally insufficient to support it.

From the Orange Circuit Court.

T. B. Buskirk, for appellant.

F. T. Hord, Attorney General, and *H. C. Duncan*, Prosecuting Attorney, for the State.

WOODS, C. J.—The appellant was convicted upon an indictment for open and notorious fornication, under section 21 of the act defining misdemeanors. 2 R. S. 1876, p. 466. We find the evidence in the record totally insufficient to support the conviction.

Judgment reversed, and cause remanded with instructions to grant a new trial.

No. 9540.

VOLTZ v. RAWLES ET AL.

From the Fountain Circuit Court.

J. B. Martin and *J. W. Copner*, for appellant.

L. Nebeker, for appellees.

Howk, J.—By a written agreement filed, “it is conceded and admitted by the appellant and the appellees that the only question involved in this cause is identical with the question involved in *Voltz v. Rawles*,” *ante*, p. 198.

Upon the authority of the case cited, this cause must be decided as that was decided.

The judgment is affirmed, with costs.

No. 8276.

SCHLARB ET AL. v. SIMONS.

From the Marshall Circuit Court.

W. B. Hess and *J. S. Frazer*, for appellants.

A. C. Capron and *C. Richardson*, for appellee.

ELLIOTT, J.—This case is affirmed, upon the authority of *Lovely v. Speisshoffer*, *ante*, p. 454.

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No. 10,051.

LA CAISSE GENERALE DES ASSURANCES AGRICOLES ET DES ASSURANCES CONTRE L'INCENDIE ET AL. v. CARPENTER.

From the Vigo Circuit Court.

C. P. Jacobs and *C. S. Spritz*, for appellants.*G. A. Knight*, *C. H. Knight*, *S. M. McGregor*, *I. N. Compton*, *C. F. McNutt* and *J. G. McNutt*, for appellee.

BICKNELL, C. C.—The decisive question in this case is the same as in *Traders Ins. Co. v. Carpenter*, ante, p. 350. Here, as in that case, the appeal was taken after the appellant had prosecuted to final judgment a bill of review in the circuit court, for error of law appearing in the record of the original judgment. Thereby this appeal was barred. It ought to be dismissed, for the reasons stated in the preceding case.

PER CURIAM.—It is therefore ordered that the appeal herein be and the same is hereby dismissed, at the costs of the appellants.

 No. 10,482.

PEACHER v. THE STATE.

From the Orange Circuit Court.

T. B. Buskirk, for appellant.*F. T. Hord*, Attorney General, and *H. C. Duncan*, Prosecuting Attorney, for the State.

ZOLLARS, J.—Appellant was convicted upon an indictment charging him with living in open and notorious fornication. The evidence is the same as in *Peacher v. State*, ante, p. 601. Upon the authority of that case, the judgment is reversed, with instructions to the court below to grant a new trial.

 No. 10,556.

BERNDT v. REITZ ET AL.

From the Vanderburgh Circuit Court.

C. A. DeBruler and *E. R. Hatfield*, for appellant.*C. Denby* and *D. B. Kumler*, for appellees.

HOWK, J.—In this case the only error assigned by the appellant, the defendant below, is the decision of the court in overruling his motion for a new trial. The only causes assigned for such new trial were, that the finding of the court was contrary to and not sustained by the evidence, and that it was contrary to law. Manifestly, therefore, the only question for the decision of this court is this: Is there legal evidence in the record tending to sustain the finding of the trial court on every material point? This question must be answered in the affirmative. The finding is sustained by an abundance of such evidence, and there is none, we think, to the contrary. In such a case this court will not disturb the finding of the trial court. *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Stockwell v. Thomas*, 76 Ind. 506; *Walker v. Beggs*, 82 Ind. 45.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs and ten per centum damages.

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Supersedeas.—Bond, Effect of.—Pleading.—Costs.—Measure of Damages.—H. recovered a personal judgment against J. R. and D. R. for \$631.76, and costs, and a foreclosure of a chattel mortgage against them and J. H., with a decree for the sale of the property to make the debt and costs. J. H. appealed to the Supreme Court, and, having given a proper bond, obtained a supersedeas. The judgment and decree were affirmed after the lapse of two years, but meantime the value of the mortgaged property had deteriorated by use and abuse, from \$1,000 to little or nothing, so that, on final sale by the sheriff upon the decree, it yielded only \$265, so that, deducting also some payments, there remained of the judgment unsatisfied the sum of \$302.05; J. R. and D. R. having been at all times insolvent. Suit on the appeal bond.

Held, that a complaint alleging these facts was good on demurrer.

Held, also, that the supersedeas having restrained all proceedings on the personal judgment, as well as the decree for sale, there was a liability on the bond for whatever injury was liable to result to the plaintiff from the appeal, and not merely for costs; but what would be the measure of damages upon a complaint so meager in its averments is not decided.

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CITY.

See HUSBAND AND WIFE, 6; JUDGMENT, 11; TAXES, 7; TOWN.

1. *Coasting on Streets*.—*Personal Injury to Traveller*.—*Liability*.—A city, after having adopted an ordinance prohibiting, upon its streets, sports tending to produce bodily injury, is not liable for a collision occurring upon a street, whereby a traveller was injured, as the result of coasting for sport, though the sport was carried on by crowds, publicly, in the presence of its officers and police, to the obvious danger of persons using the street. *Faulkner v. Aurora*, 130
2. *Powers*.—*Fire Ordinance*.—An ordinance prohibiting the keeping on any one block, at one time, of more than five tons of straw, unless protected by a fire-proof enclosure, is authorized by the statute concerning cities. R. S. 1881, sections 3106, 3155, 3198, 3199. *Clark v. South Bend*, 276
3. *City Court, How Established*.—*Tenure of Judge*.—A resolution of the common council which directs the election of a city judge according to section 3204, R. S. 1881, brings the city under that act (sections 3204–3221), and the judge so elected holds office until his successor is elected and qualified, and no further order of the council is required directing future elections. *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 471

CITY COURT.

See CITY, 3; JUDGMENT, 11.

COASTING.

See CITY, 1.

COLLATERAL ATTACK.

See DECEDENTS' ESTATES, 12; JUDGMENT, 2, 10, 11; SHERIFF'S SALE, 4.

COLLATERAL SECURITY.

See PROMISSORY NOTE, 4, 9, 10.

COMMON LAW.

See CRIMINAL LAW, 16, 19; HUSBAND AND WIFE, 11, 12.

COMMON SCHOOL FUND.

See ATTORNEY GENERAL, 1; MORTGAGE, 5 to 7.

CONCLUSIONS OF LAW.

See ASSIGNMENT OF ERROR, 4; MORTGAGE, 2, 3; SPECIAL FINDING.

CONFLICT OF LAWS.

See CONTRACT, 11.

1. *Foreign Statutes in Derogation of Common Right*.—*Construction*.—Statutes in derogation of common right, as for instance, if in restraint of the owner's power to dispose of his personal estate, and especially a foreign statute, when invoked, if it may be at all, to affect transactions in this State, will be strictly construed. *Pond v. Sweetser*, 144

2. *Same.—Trust and Trustee.—Personal Property.*—A foreign statute, which forbids the creation of a trust in personalty for the sole use of the person declaring the trust, will not be deemed to affect a transfer or assignment made in this State of property situated here, by a resident of the foreign State, in trust partly for himself and partly for others. *Ib.*

CONSIDERATION.

See CHATTEL MORTGAGE, 1; CONTRACT, 6 to 10; DEED; MARRIED WOMAN, 4, 5; MORTGAGE, 1, 11; PRINCIPAL AND SURETY, 1; PROMISSORY NOTE, 3, 4, 13; SEDUCTION.

CONSIGNOR AND CONSIGNEE.

See NEGLIGENCE, 6.

CONSTITUTIONAL LAW.

See COUNTY TREASURER, 2; MARRIED WOMAN, 3; TAXES, 3; TRUST AND TRUSTEE, 1.

1. *Statute.—Preamble.—Enacting Clause.*—An act of the Legislature is not invalid because the enacting clause is preceded by a preamble. *Barton v. McWhinney, 481*
2. *Same.—Oppressive Law.*—If a law be constitutional the courts can not declare it invalid because unreasonable and oppressive. *Ib.*

CONTINUANCE.

Practice.—There is no error in overruling a motion for delay of a cause, when no reason for delay is shown. *Cox v. Stout, 422*

CONTRACT.

See CHATTEL MORTGAGE, 2; CONVERSION, 1; DECEDENTS' ESTATES, 2, 5, 6; DEED; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE, 1 to 5, 10; JURY, 2; LANDLORD AND TENANT, 3, 4; MARRIAGE CONTRACT; MARRIED WOMAN; PARENT AND CHILD; PARTNERSHIP, 3, 4; PRACTICE, 17; PROMISSORY NOTE, 1, 8, 11, 14; REDEMPTION, 2; REPLEVIN, 3; REPLEVIN BAIL; SALE; SEDUCTION; TRUST AND TRUSTEE, 1; VENDOR AND VENDEE; WRITTEN INSTRUMENT.

1. A written contract can not be varied or controlled by a contemporaneous verbal agreement. *Moody v. Shaw, 88*
2. *Rescission.—Pleading.—Presumption.*—A general allegation in a pleading, that a contract had been rescinded, will be presumed to mean that the whole contract was annulled, and the parties reinstated in the situation occupied before the execution of the contract. *Smith v. Felton, 223*
3. *Rescission.—Sale of Leasehold.—Evidence.—Receipt.*—When the issue is whether or not a contract for the sale of an interest in certain leaseholds had been voluntarily rescinded, a later contract inconsistent with the first, and made with additional parties, is competent evidence. So, also, is a receipt showing a repayment of money paid upon the first contract. *Pedrick v. Post, 255*
4. *When Time is of the Essence.*—Unless explicitly or clearly made so in terms, time will not be deemed to be of the essence of a contract for the sale of a leasehold interest in lands. *Ib.*
5. *Champerty.—Vendor and Vendee of Land Joining in Defence Against Foreclosure of Mortgage.*—A contract is not champertous, whereby the vendor and vendee of land agree to join in defending an action against them both for the foreclosure of a mortgage upon the land, and to share the benefits of the defence if successful.

Quære, whether or not in any case, a meritorious defence to an action can or ought to be defeated by a reply that it is made under a champertous agreement between the defendant and another. *Allen v. Frazee, 283*

6. *Consideration*.—As a rule, where there is no fraud and a party receives all the consideration he contracted for, the contract will not be set aside for want or failure of consideration. *Wolford v. Powers*, 294
7. *Same*.—*Right of Parties to Determine Consideration*.—Where the value of the consideration for a contract is indefinite, the parties have a right to determine it for themselves, and courts ought not to overturn their decision upon its sufficiency. *Ib.*
8. *Same*.—Where one contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of the value should, in the absence of fraud, be left undisturbed. *Ib.*
9. *Same*.—*Promissory Note*.—*Consideration*.—A promissory note executed in consideration of a parent naming a child for the maker of the note, and in pursuance of a promise made him that if the child were so named he would provide generously for its education and support in life, is based upon a sufficient consideration. *Ib.*
10. *Same*.—*Continuous and Executed Consideration*.—*Request*.—An executed consideration will not support a promise, nor will voluntary services rendered as a mere favor or gratuity constitute a valuable consideration for a promise; but where there is a request, and continuous services of value are rendered to the person making the request, the consideration is a valid one, and will support a promise to pay for such services, although some of them were rendered prior to the request. *Ib.*
11. *Mortgage*.—*Conflict of Laws*.—A resident of this State applied to a resident of New York for a loan. Notes and a mortgage on lands here were executed here, and the money paid to the borrower here, some of the notes being payable in New York and others specifying no place of payment.
Held, that the contract, as to its validity, must be tested by the laws of Indiana. *Thompson v. Edwards*, 414
12. *Gift*.—*Promise*.—*Construction of Contract*.—G. executed to J. a writing as follows: "January 1st, 1876. This will certify that I do give to J. \$100, the money to be paid as soon as my financial condition will allow; and if I do not live to pay it, I wish it paid out of my estate." Suit thereon by J. against G.
Held, that the instrument is not a promise to pay money, but a promise to make a gift, and that an action thereon can not be maintained.
Held, also, that it is not so ambiguous as to depend for its construction upon extrinsic facts. *Johnston v. Griest*, 508
13. *Live-Stock*.—*Keeper's Lien*.—*Statute Construed*.—*Evidence*.—*Replevin*.—The evidence showed a contract whereby the defendant undertook for a price stated, to keep fifty head of cattle for the plaintiff in a manner and for a time stated; and that the defendant performed the agreement.
Held, in an action of replevin, that the jury was warranted in inferring that the defendant was in the business of feeding live-stock, and accordingly entitled under section 5292, R. S. 1881, to a lien. *Bunnell v. Davisson*, 557
14. *Same*.—*Express Stipulation Excludes Implication*.—If a contract for feeding and caring for cattle provides specifically what shall be done in certain particulars, any implication of duty to exercise reasonable care in those particulars is excluded, and the stipulated things must be done. *Ib.*

CONTRIBUTION.

See PRINCIPAL AND SURETY, 2.

CONTRIBUTORY NEGLIGENCE.

See ASSAULT AND BATTERY, 1; NEGLIGENCE, 2, 7.

CONVERSION.

See CRIMINAL LAW, 36; DECEDENTS' ESTATES, 11; PRINCIPAL AND SURETY, 1.

1. *Promissory Note.—Complaint.—Demand.—Parol Trust.—Deed.—Exhibit.—*
A mother contracted with a stranger for the sale of land at an agreed price. This contract she gave by delivery to her three sons, A., B. and C., and at the same time conveyed the land to A. in trust, to be conveyed to the purchaser, which was done, and a note taken in A.'s name (but really for the three) for a part of the purchase-money. B. sold his interest in the note, without endorsement, to C., while A. yet had possession of it. A. then transferred the note to D., who knew the facts, and who collected it and used the money. Suit by C. against A. and D. to recover for the conversion.

Held, that no demand need be averred; that A. held the note upon a trust which was valid though not in writing, and that the complaint of C., alleging the foregoing facts, was good on demurrer.

Held, also, that the deed was not a necessary part of the complaint.

Held, also, that, upon the facts stated, the plaintiff could recover two-thirds of the money collected by the defendant D., with six per cent. per annum until the trial.

Buntin v. Pritchett, 247

2. *Same.—Variance.—Amendment.—*In a suit for the conversion of a note, a variance as to the date and amount of the note may be amended at the trial.

Id.

CONVEYANCE.

See CONVERSION, 1; DEED; FRAUDULENT CONVEYANCE; MARRIED WOMAN; PARTITION; REDEMPTION, 1.

COPY.

See CONVERSION, 1; FRAUDULENT CONVEYANCE, 1; MORTGAGE, 9; PLEADING, 1, 3.

CORAM NOBIS WRIT.

See CRIMINAL LAW, 21 to 27; PRACTICE, 9.

CORONER.

See ATTORNEY GENERAL, 1.

CORPORATION.

See CRIMINAL LAW, 4; PROMISSORY NOTE, 11, 12.

*Stockholder.—When May Sue.—Parties.—*A stockholder in a corporation may bring suit when the corporation refuses, it being made a party defendant; in such a suit the corporation is the real beneficiary if the suit be successful.

Carter v. The Ford, etc., Co., 180

COSTS.

See APPEAL BOND; ATTORNEY GENERAL, 2; JUDGMENT, 1; MORTGAGE, 7; PRACTICE, 11.

COUNTER-CLAIM.

See MORTGAGE, 3; PLEADING, 19.

COUNTY AUDITOR.

See COUNTY TREASURER, 1; MORTGAGE, 12.

COUNTY COMMISSIONERS.

See BRIDGES.

*Claims.—Appeal.—Statute Construed.—Jurisdiction.—*The act of 1879, R. S. 1881, sections 5758, 5760, 5769, operates prospectively only, and where suits were pending in circuit courts against counties when that act took effect, it did not deprive the courts of jurisdiction thereof.

Board, etc., v. Pritchett, 68

COUNTY TREASURER.

1. *Bond.—Taxes.—County Auditor.—Relator.*—The county auditor was, by the act of 1872, concerning taxation, section 185, the proper relator in a suit on a county treasurer's bond for failure to account for and pay over taxes collected. *Heagy v. The State, ex rel., 260*
2. *Same.—Evidence.—Settlement Sheet.—Estoppel.—Constitutional Law.—Repeal of Statute.*—The act of December 21st, 1872, making the stated account with the county treasurer conclusive evidence against the treasurer and his sureties, was repealed, by necessary implication, by the act of March 31st, 1879; and the latter act, made to operate retrospectively, was within the power of the Legislature to pass. *Ib.*

COURTS.

See CITY, 3; CRIMINAL LAW, 20; JUDGMENT, 6, 11.

1. *Superior Court.—Appeal.—Transcript.—Practice.*—Where a Superior Court in general term reverses a judgment at special term, an appeal from the judgment of reversal to the Supreme Court will present no question when the transcript is so made up that it does not show the errors found by the general term, nor the directions given to the special term. *McWhinney v. Briggs, 535*
2. *Criminal Courts.—Absence of Regular Judge.—Appointment of Special Judge.—Statute Construed.*—The provisions of section 1381, R. S. 1881, are applicable to criminal courts as well as to civil courts; and where the regular judge of a criminal court fails to appear during term for a period of three days, it is competent for the proper county officers to elect a competent and reputable attorney to act and preside as judge of such court until the return of the regular judge. *Feigel v. State, 580*

COVENANT.

See LANDLORD AND TENANT, 4; PLEADING, 1; PROMISSORY NOTE, 3.

COVERTURE.

See DECEDENTS' ESTATES, 3, 4.

CRIMINAL CONVERSATION.

See PROMISSORY NOTE, 8.

CRIMINAL COURTS.

See COURTS, 2.

CRIMINAL LAW.

See INTOXICATING LIQUOR; SUPREME COURT, 28.

1. *Questions of Fact.—Jury.*—It is the province of the jury alone to determine questions of fact in a criminal case. *Moore v. State, 90*
2. *Same.—Instructions.—Evidence.—Presumption.—Witness.*—When, in a criminal trial, there has been a conflict of testimony in reference to the time of an occurrence, it is error to instruct that it may be presumed that each witness spoke according to his own timepiece, and that the difference of opinion may be so explained. *Ib.*
3. *Malicious Trespass.—Injuring Toll-Gate.—Affidavit.*—An affidavit, in a prosecution for injuring a toll-gate of a turnpike company, is not insufficient because the affiant swears to the statements therein from information and belief. *Franklin v. State, 99*
4. *Same.—Evidence.—Corporation.*—In such prosecution, it is not necessary for the State to prove the organization of such company; it is sufficient to show that it was known and recognized as a turnpike company and was operating the turnpike on which the gate was situated. *Ib.*
5. *Same.*—The fact that the gate-keeper refused to allow the defendant to

- pass through the gate, although he may have paid the toll at another gate, did not authorize him to destroy the company's property. *Ib.*
6. *Special Prosecuting Attorney.—Judicial Cognizance.*—An indictment signed by a "special prosecuting attorney" is not subject to a motion to quash, or to a plea in abatement which does not deny the due appointment of such special prosecuting attorney—the court taking judicial cognizance of its officers and of their signatures and official designations. *Choen v. State, 209*
 7. *Same.—Duties of Special Prosecuting Attorney.*—When, upon failure of the prosecuting attorney to attend, the court appoints "some person to prosecute," the appointee may perform any duty of the office, including the signing of indictments. *Ib.*
 8. *Same.—Indictment. — Burglary.—Larceny.—Election of Counts.—Practice.*—Upon an indictment of two counts, charging in one a burglary with intent to steal the goods of A., and in the other a larceny of the goods of B., the prosecuting attorney need not elect between counts, if his intention is to investigate one transaction only. *Ib.*
 9. *Same.—Word "Personal," When Unnecessary.*—An indictment for burglary with intent to steal "goods and chattels" is not bad for the want of the word *personal* before "goods and chattels." *Ib.*
 10. *Same.—Ownership of Goods.*—An indictment charging the larceny of specified articles, "of the value," etc., "*and the property of A.,*" shows that the articles named are the property of A. *Ib.*
 11. *Same.—Practice.—Evidence.*—When the evidence shows indisputably that the conviction was had under the second count of an indictment, rulings in reference to the first count are immaterial. *Ib.*
 12. *Practice. —Appeal.—Dismissal.*—The defendant in a criminal case may, within one year after judgment, take an appeal, by the service of a written notice upon the clerk of the court in which the judgment was rendered, and upon the prosecuting attorney; but, unless the transcript be filed in the Supreme Court within ninety days after such service of notice, the appeal will be dismissed. *Farrell v. State, 221*
 13. *Right of Defendant to Plead.*—One charged with a crime has a right to plead, free from restraint and fear of violence. *Sanders v. State, 318*
 14. *Same.—Remedy where Right to Plead is Denied.*—Where the accused is forced, through fear of mob violence, to enter a plea of guilty, he has a right to relief from the judgment entered on such plea. *Ib.*
 15. *Same.—Procedure.—Statutory Remedies.*—Where the statute prescribes a remedy, it must be pursued, and resort can not be had in such a case to the common-law procedure. *Ib.*
 16. *Same.—Procedure where Plea is Extorted by Violence.*—The statute does not make provision for cases where the plea is forced from an accused through fear, and resort may be had to the common-law procedure. *Ib.*
 17. *Same.—Pardon.*—The fact that the power to pardon is lodged in the Governor does not deprive the courts of power to grant relief in a proper case. *Ib.*
 18. *Same.—Effect of Pardon.*—A pardon is the exercise of executive clemency, and, as an accused is entitled to an impartial trial, that right can not be denied him on the ground that the Governor may pardon in cases where he is satisfied that there is an unjust conviction. *Ib.*
 19. *Same.—Common-Law Rules.*—The rules of common law not inconsistent with our Constitution or statutes, and not opposed to our system of government, may be resorted to when necessary to vindicate a clear right. *Ib.*
 20. *Same.—Courts.—Inherent Powers.*—Courts possess inherent powers independent of legislative enactment, and among them is the power to

- prevent a judgment obtained by duress from being enforced against an accused person. *Ib.*
21. *Same.—Writ Coram Nobis.*—The right to maintain a proceeding in the nature of a writ *coram nobis* has not been abrogated by our statute. *Ib.*
 22. *Same.—When Writ Coram Nobis Proper.*—A writ *coram nobis* will lie when it is necessary for the accused to bring some new fact before the court which can not be presented in any of the methods provided by statute, but it will not lie in cases covered by statutory provisions. *Ib.*
 23. *Same.—Duress.—Plea Extorted by.—Judgment.*—A plea of guilty, forced from an accused by a well-grounded fear of mob violence, will not sustain a judgment of conviction when properly attacked. *Ib.*
 24. *Same.—Setting aside Sentence.*—A sentence pronounced on a plea of guilty, forced from an accused by a well-grounded apprehension of mob violence, may be set aside in a proceeding in the nature of a writ *coram nobis*. *Ib.*
 25. *Same.—Jeopardy.*—An accused is not in jeopardy where the only plea filed by him is one of guilty, and filed because of a well-grounded fear of mob violence. *Ib.*
 26. *Same.—When Jeopardy Attaches.*—An accused is not in jeopardy until the case is ripe for trial and the trial is actually entered upon, and jeopardy does not attach in cases where the only plea is one forced from the defendant by fear. *Ib.*
 27. *Same.—Necessity.—Acts Excused by.*—A defendant who enters a plea of guilty upon a necessity produced by well-grounded fear and imminent danger of mob violence, may avoid the plea by a proceeding in the nature of a writ *coram nobis*. *Ib.*
 28. *Practice.—Motion for New Trial.—Witness.*—The refusal of the court, in a criminal trial, to permit a witness to answer a question, presents no question on appeal, unless specified as a cause in the motion for a new trial. *Pemberton v. State, 507*
 29. *Same.—Assignment of Error.*—It is not proper in a criminal (as well as civil) case, to assign error upon a cause for a new trial. *Ib.*
 30. *Same.—Indictment for Exhibiting Gambling Device.*—An indictment for exhibiting "a certain gambling device" need not give the particular name of the device. *Ib.*
 31. *Affidavit and Information.—Variance.*—In a prosecution by affidavit and information for a misdemeanor, the information must be supported by an affidavit charging the same offence as that described in the information, and, therefore, where the affidavit upon which the information is based charges that the offence was committed on the 24th day of December, 1881, and the offence described in the information is alleged to have been committed on the 24th day of January, 1881, a motion to quash should be sustained. *Dyer v. State, 525*
 32. *Same.—Amendment.—Practice.*—An information, after a motion to quash has been made in the trial court, can not be amended in the Supreme Court. *Ib.*
 33. *Same.—Motion to Quash.*—It is not necessary, upon a motion to quash, to state to the trial court the specific objections to the affidavit and information. *Ib.*
 34. *Justice of the Peace.—Discharge of Jury.*—The strict rules governing trials for felonies in courts of superior jurisdiction are not applicable to trials before justices of the peace for misdemeanors; hence the discharge of a justice's jury, after three hours' deliberation, it being then late in the night, the defendant not objecting, but demanding another trial, will be presumed to have been regular, and will not bar another prosecution. *Fowler v. State, 538*

35. *Same.—Instruction to Jury.—Jury Judges of the Law.*—In criminal cases the jury are, by the 19th section of the Bill of Rights, the judges of the law as well as the facts, and need not be governed by the instructions of the court or the decisions of the Supreme Court, and it is proper for the court to so instruct the jury. *Ib.*
36. *Affidavit and Information.—Unlawful Conversion of Estray Property.*—Where an affidavit and information contain a good and sufficient charge of the unlawful conversion of estray property, before the title thereto had vested in the defendant, they will not be held bad, on a motion to quash, merely because they contain other matter not sufficient to constitute a charge of another public offence, which may properly be regarded as surplusage. *Smith v. State, 553*
37. *Same.—Pleading.—Language of Statute.*—In criminal pleading, as a general rule, it is sufficient to charge the offence, whether in an affidavit, information or indictment, in the language of the statute defining the offence. *Ib.*
38. *Same.—Former Acquittal.—Sufficiency of Plea.*—If it appear that the same evidence will be required to secure a conviction in a pending, as in a former, prosecution, a plea of former acquittal, if sufficient in form, is a complete bar to the pending prosecution. *Ib.*
39. *Prosecution by Affidavit and Information.—Jurisdictional Facts.*—Under section 1733, R. S. 1881, where a prosecution is by affidavit and information, it is not necessary to state in the information the jurisdictional facts which must exist, under the provisions of section 1679, R. S. 1881, to entitle the State to prosecute the defendant by information based upon affidavit instead of by indictment. *Hodge v. State, 561*
40. *Same.—Sufficiency of Evidence.—Supreme Court.*—Where it appears that the jury were authorized by the evidence in the record to find the defendant guilty, the Supreme Court will not disturb their verdict on the evidence. *Ib.*
41. *Same.—Instructions to Jury.—Omission to Instruct.—Available Error.*—Where the court's instructions to the jury are right, but there is an omission to instruct on some point, the defendant can not, by merely saving an exception to the instructions given, get an available error into the record on account of such omission to instruct. *Ib.*
42. *Affidavit.—Information.*—An affidavit filed, as the basis of an information for larceny, in the Allen Criminal Court, in which it is stated that "said S. is now in the custody of the sheriff of Allen —, and confined in the jail of said county," sufficiently shows that S., the defendant, is in custody of the sheriff of Allen county. *Sovine v. State, 576*
43. *Same.—Larceny.—Amendments.—Supreme Court.*—An information for grand larceny which fails to aver that the acts were done "feloniously," is bad on motion to quash, and, though it might have been cured by amendment, the Supreme Court will not treat it as if the amendment had been made. *Ib.*
44. *Indictment.—Surplusage.*—Where an indictment contains a sufficient charge of a public offence, mere surplusage will not vitiate such indictment. *Feigel v. State, 580*
45. *Pleading.*—In charging malicious trespass (R. S. 1881, sec. 1955), the acts charged need not be alleged to have been done "unlawfully." *State v. Maddox, 585*

CROPS.

See RECEIVER, 2; SALE, 2.

CROSS COMPLAINT.

See SUPREME COURT, 18.

CROSS-EXAMINATION.

See SUPREME COURT, 14.

DAMAGES.

See APPEAL BOND; ASSAULT AND BATTERY, 2; ATTACHMENT, 3 to 6; NEGLIGENCE, 4, 5; PROMISSORY NOTE, 8; RAILROAD, 2; REPLEVIN, 1, 2; SUPREME COURT, 2.

DECEDENTS' ESTATES.

See DESCENTS; JUDGMENT, 7, 9; MORTGAGE, 1; PLEADING, 13; STATUTE OF LIMITATIONS, 2; SUPREME COURT, 13; WILL.

1. *Pleading.—Claim Against Estate.*—A formal complaint is not necessary in prosecuting a claim against an estate. *Hileman v. Hileman*, 1
2. *Allowance of Claims.—Notes not Payable in Bank.—Contract of Assignor.—Warranty.—Due Diligence.*—Where a claim is filed against the estate of a decedent, as the assignor of a promissory note not payable in a bank in this State, the contract of the assignor is a warranty that the maker of the note is liable thereon and able to pay it; and section 5504, R. S. 1881, provides that the assignee of such note, having used due diligence in the premises, shall have his action against his immediate or any remote assignor. *Huston v. First Nat'l Bank, etc.*, 21
3. *Same.—Sufficiency of Claim.—Failure to use Due Diligence.—Sufficient Excuse.—Insolvency or Coverture of Maker.—Assignor's Request.*—A claim against the estate of a decedent, as the assignor of a promissory note not payable in a bank in this State, will be sufficient to withstand a demurrer thereto, for the want of facts, if it show either the use of due diligence in the premises against the maker of the note, or a sufficient excuse for the failure to use due diligence; and the insolvency or coverture of the maker of the note, or the request of the assignor not to sue such maker, will constitute a sufficient excuse. *Ib.*
4. *Same.—New Trial.—Evidence.*—On the trial of such a claim against the assignor's estate, the excuse alleged in the claim, for the failure to use due diligence against the maker of the note, is a material part of the claimant's cause of action, and must be sustained by sufficient evidence; and where the record shows that no evidence was given on the trial to sustain the alleged excuse, a new trial should be granted. *Ib.*
5. *Administrator's Sale of Real Estate.—Contract.*—The purchaser of real estate at an administrator's sale takes the land subject to all encumbrances, unless the order of sale otherwise directs, and the legal effect of the contract can not be contradicted by a verbal contemporaneous agreement. *Moody v. Shaw*, 88
6. *Same.—Promissory Note.—Set-Off.—Taxes.—Promise of Administrator.*—To a suit by an administrator *de bonis non*, on a promissory note given for the purchase of land at an administrator's sale, an answer of set-off for taxes paid on the land by the defendant, at the request of the former administrator, is insufficient; the mere promise of the administrator being insufficient to bind the estate in the absence of facts showing the right to charge the estate, or that the consideration for the promise arose prior to the intestate's death. *Ib.*
7. *Mistake.—Settlement with Administrator.—Negligence.—Equity.*—Equity favors the diligent and will not afford relief from a mistake made in a settlement with an administrator, to a party who, besides his negligence at the time of the mistake, offers no explanation of his failure to discover it before the final settlement of the estate and discharge of the administrator. *Dickey v. Tyner*, 100
8. *Same.—Setting Aside Final Settlement.*—It is not good ground for setting aside a final settlement of an estate, that, by mistake, the administra-

- tor had collected of a debtor the full amount of his note, a credit endorsed on the note having been overlooked—no reason being shown why the mistake could not have been discovered before the final settlement. *Ib.*
9. *Same.—Liability of Heirs.*—One who, by mistake, fails to get the benefit of a credit endorsed upon a note held against him by an administrator and does not discover the fact until after final settlement of the estate has no cause of action against the heirs or distributees of the estate. *Ib.*
10. *Right of Action.—Representative and Heir.*—The right to sue for money or other personalty of a decedent belongs to the personal representative, not to the heir or widow. *Pond v. Sweetser, 144*
11. *Administrator.—Suit on Bond.—Parties.—Evidence.—Conversion.—Demand.*—In a complaint on the bond of a deceased administrator, on the relation of a creditor, alleging, as breaches, failure to pay the creditor's claim, conversion of the assets, and failure to settle the estate in proper time, neither other unpaid creditors nor the administrator of the deceased administrator are necessary parties, nor is proof of a demand and failure to pay sufficient proof of a conversion of the assets. *Embree v. State, ex rel., 368*
12. *Preferred Claims.—Attorneys' Lien.—Res Adjudicata.—Judgment.—Collateral Attack.—Trustee.*—A suit was pending against B., when she died, to recover attorneys' fees for services in a cause wherein B. had recovered a judgment for \$25,000. Her administrator having then been made a party, such proceedings were had that the sum of \$5,000 was allowed to the attorneys, and a decree entered establishing a lien therefor upon the judgment. The attorneys afterwards, by petition, applied for an order upon the administrator to compel him to pay their allowance out of the proceeds of the judgment as a preferred claim, and the other creditors of the estate were made defendants to the petition. *Held*, that the order prayed was properly granted. *Held*, also, that the original decree establishing the lien, being unreversed, was an adjudication which bound all creditors of the estate, though not parties thereto, the administrator being their proper representative and, as to them, the trustee of an express trust, and, however erroneous, such creditors could not question it collaterally. *Blunkenbaker v. Bank of Commerce, 459*
13. *Liability of Distributees.—Embezzlement.*—Where an administrator embezzles the assets of an intestate, and dies, having so mingled such assets with his own that they pass to his administrator and can not be identified, those entitled to distribution of the first estate, having made no claim until after settlement and distribution of the last estate, can not maintain a suit against those to whom the last estate has passed by distribution. *McComas v. Long, 549*
14. *Claims.—Statute of Limitations.—Practice.—Pleading.—Statute Construed.*—Under the provisions of the act of February 4th, 1881 (Acts 1881, p. 20), until September 19th, 1881, the statute of limitations must have been pleaded to a claim against a decedent's estate, as in a civil action. *Candy v. Coppock, 594*

DECISIONS OF THE SUPREME COURT.

See MORTGAGE, 2; SUPREME COURT, 5.

DECLARATIONS.

See EVIDENCE.

DEED.

See CONVERSION, 1; FRAUDULENT CONVEYANCE; MARRIED WOMAN, 4, 5; MORTGAGE, 2; PARTITION; REDEMPTION.

Delivery.—Escrow.—Depository.—Agreement.—A deed, made in consideration

of natural love and an agreement for support, to two sons and the wife of another son, and, after signing and being acknowledged, handed by the grantor to the husband of the female grantee, with the direction, "Take it and give it to some one to keep while I live, then to be recorded," and then given to the grantor's wife, and by her kept until the grantor's death, and then recorded, though the grantor had, a few days after the transaction, said it had not been delivered, is a good delivery of the deed. *Squires v. Summers*, 252

DEFAULT.

See JUDGMENT, 3, 6; PLEADING, 17; SUPREME COURT, 27.

DEFECTS CURED.

See BOND, 3, 4; CRIMINAL LAW, 43; PRACTICE, 15.

DELIVERY.

See DEED; PRINCIPAL AND SURETY, 1; SALE, 2; VENDOR AND VENDEE, 1.

DEMAND.

See CONVERSION, 1; DECEDENTS' ESTATES, 11; HUSBAND AND WIFE, 2; PRINCIPAL AND SURETY, 1.

DEMURRER.

See DEMURRER TO EVIDENCE; PLEADING, 2, 4, 6, 7, 14, 16; PRACTICE, 18; RECEIVER, 4; STATUTE OF LIMITATIONS, 1; SUPREME COURT, 3, 21.

DEMURRER TO EVIDENCE.

1. *Practice*.—By demurring to the evidence, in case of conflict, a party withdraws from consideration whatever is favorable to himself and consents that whatever reasonable inferences can be, shall be drawn from the evidence against him. *Ruff v. Ruff*, 431
2. *Same*.—*Verdict*.—If the evidence is sufficient to sustain a verdict on appeal, it is sufficient to withstand a demurrer. *Ib.*
3. *Same*.—*Contest of Will*.—*Evidence*.—See opinion for a statement of evidence deemed sufficient, on demurrer, to sustain an action to set aside a will as "unduly executed." *Ib.*
4. *Practice*.—*Dismissal*.—The general denial and affirmative defences being pleaded, the plaintiff, after both parties had put in evidence and rested, demurred to the evidence, and the court compelled the defendants to join in the demurrer. The demurrer was overruled, and then the plaintiff was permitted to dismiss his suit.

Held, that the demurrer was wholly unauthorized.

Held, also, that no judgment could properly be rendered upon it.

Held, also, that there was no error in permitting the plaintiff to dismiss his cause. *Plant v. Edwards*, 588

DEPOSITARY.

See DEED; PLEADING, 3.

DESCENTS.

See PARTITION; WILL, 1.

Statutes Construed.—*Collateral Heirs*.—*Distribution*.—Collateral relatives in the second degree, where any in the first degree also survive, take *per stirpes*, under R. S. 1881, sections 2468, 2469 and 2470. Thus, the heirs being nine nephews surviving, and grand-nephews, children of two nephews deceased, the latter take the shares which would have gone to their respective parents had they survived. *Blake v. Blake*, 65

DESCRIPTION.

See MORTGAGE, 5, 12; REAL ESTATE, ACTION TO RECOVER, 4, 5.

DILIGENCE.

See DECEDENTS' ESTATES, 2 to 4; VENDOR AND VENDEE, 1, 4.

DISMISSAL.

See CRIMINAL LAW, 12; DEMURRER TO EVIDENCE, 4; PRACTICE, 17; SUPREME COURT, 6, 13, 15.

DONATION.

See HUSBAND AND WIFE, 6.

DRAWER AND DRAWEE.

See BILL OF EXCHANGE.

DURESS.

See CRIMINAL LAW, 13 to 27; MARRIAGE CONTRACT; MORTGAGE, 10.

EJECTMENT.

See NEW TRIAL, 2, 3; REAL ESTATE, ACTION TO RECOVER; RECEIVER, 2; SHERIFF'S SALE, 4; WITNESS, 2.

ELECTION.

See CITY, 3; WILL, 1.

EMBEZZLEMENT.

See DECEDENTS' ESTATES, 13.

ENDORSER AND ENDORSEE.

See DECEDENTS' ESTATES, 3, 4; PROMISSORY NOTE, 5, 9.

EQUITY.

See DECEDENTS' ESTATES, 7; SHERIFF'S SALE, 1.

EQUITY OF REDEMPTION.

See MORTGAGE, 4.

ESCROW.

See DEED.

ESTOPPEL.

See COUNTY TREASURER, 2; FRAUDULENT CONVEYANCE, 2; MORTGAGE, 3; PLEADING, 1; PRINCIPAL AND SURETY, 1; PROMISSORY NOTE, 13; REDEMPTION, 2.

ESTRAYS.

See CRIMINAL LAW, 36.

EVICITION.

See MORTGAGE, 1; PROMISSORY NOTE, 3.

EVIDENCE.

See ASSAULT AND BATTERY, 1; ATTACHMENT, 8; BILL OF EXCEPTIONS, 1, 4; CONTRACT, 3, 13; COUNTY TREASURER, 2; CRIMINAL LAW, 2, 4, 11, 38, 40; DECEDENTS' ESTATES, 4, 11; DEMURRER TO EVIDENCE; INSTRUCTIONS, 3, 6; INTOXICATING LIQUOR, 2, 5; JUDGMENT, 8, 9; MARRIAGE CONTRACT, 2; NEGLIGENCE, 3, 4, 6; NEW TRIAL, 4; PLEADING, 18; PRACTICE, 8, 12, 15, 16; PROMISSORY NOTE, 2; RAILROAD, 2; SUPREME COURT, 1, 4, 8, 12, 14, 19, 23 to 25, 28; TAXES, 2; VERDICT; WITNESS.

Hearsay.—Title to Personal Property.—In an action by A. against B. to try the title to property levied upon as the property of C., to satisfy a judgment recovered against C. by B., it is error to allow B. to prove that C., who was not a party to the suit, claimed the property, as such statement, in the absence of A., was mere hearsay. *Somers v. Somers, 599*

EXCEPTION.

See BILL OF EXCEPTIONS; MORTGAGE, 2, 3; NEW TRIAL, 2; PRACTICE, 2, 5; SPECIAL FINDING; SUPREME COURT, 7, 17.

EXCESSIVE DAMAGES.

See ASSAULT AND BATTERY, 2; NEGLIGENCE, 5; SUPREME COURT, 2.

EXCUSE.

See ASSAULT AND BATTERY, 1; DECEDENTS' ESTATES, 3, 4; NEGLIGENCE, 7; PLEADING, 3; PRINCIPAL AND SURETY, 1.

EXECUTION.

See JUDGMENT, 2; REPLEVIN BAIL; SALE; SHERIFF'S SALE.

1. *Levy.—Chattel Mortgage.—Replevin.*—The sheriff may, by reason of the statute, R. S. 1881, section 722, levy upon and seize property which is under chattel mortgage, and is not thereby subject to an action of replevin at the suit of the mortgagee. *Louthain v. Miller, 161*

2. *Lien.*—An execution, upon its delivery to the officer, becomes a lien on personalty, and such lien will prevail against any subsequent purchaser. *Dixon v. Duke, 434*

EXECUTOR.

See TRUST AND TRUSTEE, 3; WILL, 3.

EXEMPTION LAW.

See REPLEVIN BAIL.

Waiver of Right.—Where the right to an exemption exists by statute, it can not be waived by contract prior to the issuing of the execution.

Maloney v. Newton, 565

EXHIBIT.

See CONVERSION, 1; FRAUDULENT CONVEYANCE, 1; MORTGAGE, 9; PLEADING, 1, 3.

FALSE REPRESENTATIONS.

See PROMISSORY NOTE, 7.

FENCE.

See RAILROAD, 1.

FINDING.

See PRACTICE, 16, 19; SPECIAL FINDING; SUPREME COURT, 8; VERDICT.

FIRE INSURANCE.

See INSURANCE.

FIXTURES.

See MORTGAGE, 8.

FORECLOSURE.

See CONTRACT, 5; MARRIED WOMAN, 2, 3; MORTGAGE; PLEADING, 13.

FOREIGN STATUTE.

See CONFLICT OF LAWS; CONTRACT, 11.

FORMER ACQUITTAL.

See CRIMINAL LAW, 38.

FORMER ADJUDICATION.

See ATTACHMENT, 2; DECEDENTS' ESTATES, 12; LANDLORD AND TENANT, 1; MORTGAGE, 2; SUPREME COURT, 5; TOWN, 3.

FRAUD.

See ATTACHMENT, 8; BASTARDY; CHATTEL MORTGAGE, 2; FRAUDULENT CONVEYANCE; PARTNERSHIP, 5; PLEADING, 6; PRINCIPAL AND SURETY, 1; PROMISSORY NOTE, 3, 7, 13; VENDOR AND VENDEE.

FRAUDULENT CONVEYANCE.

See ATTACHMENT, 8.

1. *Real or Personal Property.—Complaint.—Exhibits.*—In a suit by a creditor to set aside the conveyance of real estate, or the written transfer of personal property, as fraudulent against the grantor's creditors, neither the conveyance nor the bill of sale is the foundation of the creditor's cause of action; and, therefore, it is not necessary to the sufficiency of the complaint, upon a demurrer thereto for the want of facts, that a copy of the conveyance or bill of sale should be made an exhibit or filed with the complaint. *Heckelman v. Rupp, 286*
2. *Estoppel.—Husband and Wife.*—Suit by a judgment creditor to reach real estate, alleged to have been conveyed by the debtor through another to the debtor's wife to defraud the creditor, and by the wife to W., with notice. Answer in estoppel, that the creditor, while the wife held title and because thereof, had taken the wife's note. *Heaton v. White, 376*
Held, that the answer was bad.
3. *Same.—Trust.—Parol Agreement.*—A further answer, that title to another tract of land, which had been paid for mostly by the money of the wife, had been conveyed to the husband upon his parol agreement to hold it in trust for the wife, and that the land in controversy was paid for by the proceeds of that tract, and the conveyance taken to the husband before the indebtedness accrued, upon his parol agreement to hold in trust for the wife, and that she had invested her own funds in improving the land, and denying all fraud, was held good on demurrer. *Ib.*

GAMBLING.

See CRIMINAL LAW, 30.

GIFT.

See CONTRACT, 12; HUSBAND AND WIFE, 5.

GRAVEL ROAD.

See PROMISSORY NOTE, 11, 12.

GROWING CROPS.

See RECEIVER, 2; SALE, 2.

GUARDIAN AND WARD.

See HUSBAND AND WIFE, 11.

HANDWRITING.

See WITNESS, 1.

HARMLESS ERROR.

See PRACTICE, 19; SUPREME COURT, 3, 12.

HEIRS.

See DECEDENTS' ESTATES, 9, 10, 14; DESCENTS; PARTITION.

HIGHWAY.

See NEGLIGENCE, 3.

HOUSEHOLDER.

See REPLEVIN BAIL, 3.

HUSBAND AND WIFE.

See DEED; FRAUDULENT CONVEYANCE, 2, 3; MARRIED WOMAN; MECHANIC'S LIEN; MORTGAGE, 10, 11; PARTITION; REAL ESTATE, ACTION TO RECOVER, 1; WILL, 1.

1. *Contract.—Wife's Separate Property.*—Under statutory provisions that a wife's separate property shall remain her own, and that she may contract concerning it, or part with it, only with the consent of the husband, her contract with the husband does not bind her.
Hileman v. Hileman, 1
2. *Same.—Statute of Limitations.—Trust and Trustee.—Demand.*—If a wife sue her husband or the administrator of his estate upon his express promise to repay money received of her, the statute of limitations may be pleaded; but if, disregarding the contract, she treat him as a trustee, as she may, the statute affords no defence until after demand and refusal to account, or the equivalent thereof. *Ib.*
3. *Same.—Presumption.—Husband a Trustee.*—The presumption under the statute is that the money or property of a wife acquired by descent, devise or gift, remains her separate property, and that, if the husband takes the possession and management thereof, he does it as trustee for her. *Ib.*
4. *Same.*—If a husband collect or receive moneys owing or belonging to his wife, or instead thereof take up and cancel his own obligations, he is accountable to her. *Ib.*
5. *Same.—Advancement to Daughter by Giving Credit to Husband.*—If a father make an advancement or gift to his daughter by reducing the price of land conveyed to her husband, the latter, in the absence of an express promise, is not liable to his wife, as trustee or otherwise, for the amount of the reduction. *Ib.*
6. *City.—Donation of Land for Street by Husband Bars Wife's Interest.—Acceptance.*—A donation or grant of land by a husband, during life, to a municipal corporation for use as a street, noted as such on the plat of the city or an addition thereto, made in accordance with the statute, R. S. 1881, sec. 3374 *et seq.*, and accepted by the city, bars the inchoate interest of his wife in such land. *Duncan v. Terre Haute, 104*
7. *Judicial Sale.—Assignment for Benefit of Creditors.—Wife's Inchoate Interest.*—If a husband owning realty makes an assignment, under the statute, for the benefit of creditors, the assignee can sell only the undivided two-thirds of the land; such sale being a judicial sale whereby, under the law of 1875, the wife's inchoate right becomes absolute.
Wright v. Gelvin, 128
8. *Disposition of Personalty.*—The law of this State places no restriction, in the interest of the wife, upon the power of a husband to dispose of his personal estate. *Pond v. Sweetser, 144*
9. *Wife's Personal Services.*—Before the act of 1879 the personal services and earnings of a wife belonged to the husband. *Davis v. Davis, 157*
10. *Same.—Promise to Wife.—Maintenance of Child in Family.*—Where a man and woman, owning adjoining farms, marry, and, dwelling in the house of the wife, live upon the products of both farms indiscriminately, maintaining as a member of their family a grandchild of the husband, the wife can not (after the death of the husband) maintain an action against the child's father upon his promise made to her to pay her for caring for and maintaining the child. *Ib.*
11. *Wife's Personalty at Common Law.—Reduction to Possession.*—Before 1851 the common law in respect to husband and wife was in force in Indiana, whereby the wife's personal estate, such as money, goods, chattels, and movables which she had in possession at the time of the marriage,

vested immediately and absolutely in the husband ; and so of money in the hands of her guardian, from whom it was received by the husband.

Waldron v. Sanders, 270

12. *Same.—Common Law.—Trust.*—If at common law a wife, having money in her own right and custody, delivers it to her husband under his promise to invest it in real estate for her and in her name, but he, without her knowledge, takes the title in his own name, he does not hold the land in trust for her, because the money was in fact and in law not hers but his. *Ib.*

IMPROVEMENTS.

See REAL ESTATE, ACTION TO RECOVER, 2.

INDICTMENT.

See CRIMINAL LAW, 6, 8 to 12, 30, 44 ; INTOXICATING LIQUORS.

INJUNCTION.

See JUDGMENT, 2, 3, 9 ; NUISANCE.

INSOLVENCY.

See DECEDENTS' ESTATES, 3, 4.

INSTRUCTIONS TO JURY.

See ATTACHMENT, 5 ; BILL OF EXCEPTIONS, 2 ; CRIMINAL LAW, 2, 35, 41 ; INTOXICATING LIQUOR, 5 ; MARRIAGE CONTRACT, 1, 2 ; PRACTICE, 8, 15 ; RAILROAD, 2 ; SUPREME COURT, 4, 10 to 12, 25 ; WRITTEN INSTRUMENT.

1. *Practice.—Interrogatories.*—An oral statement by the judge to the jury, directing them to answer certain interrogatories, is not an instruction within the meaning of the law, and there is no error in making it after a request to instruct in writing. *Trentman v. Wiley, 33*
2. *Same.*—The refusal of the court to give an instruction to the jury applicable to facts which the jury find do not exist is not error. *Ib.*
3. *Evidence.*—An instruction which recites a part of the evidence, and tells the jury that, if they believe it, then the act complained of was not the act of the defendant, ought not to be given, if there was other evidence upon the same point consistent with that recited, which tended to show that the act was that of the defendant. *Pittsburgh, etc., Co. v. Sponier, 165*
4. *Same.*—It is not error to refuse a correct instruction if its substance be given in another form. *Ib.*
5. *Same.*—Verbal omissions and errors in an instruction, which impair its literal accuracy, but can not be supposed to mislead the jury—e. g., omitting to specify a certain time, which is nevertheless clearly implied—do not constitute an available objection. *Ib.*
6. *Same.*—The court may properly state to the jury that there was evidence tending to prove a given fact ; it may even recapitulate the evidence and say what it conduces to prove, if the jury be also told that they must determine for themselves what it does really establish. *Ib.*
7. *Assumption of Facts.*—An instruction of the court to the jury, which assumes the truth of facts in issue between the parties, is erroneous. *Heckelman v. Rupp, 286*
8. *Record.*—Where instructions are not signed by the judge or the party asking them, or his attorney, and the record does not show that they were filed, and they are not in a bill of exceptions, they are not properly a part of the record. *Heaton v. White, 376*

INSURANCE.

Waiver of Conditions.—Agent's Authority.—An adjusting agent of a fire insur-

ance company to whom a loss is referred by the company, with authority to manage and control it until it is disposed of, has authority to waive the preliminary proofs of loss which the policy requires to be made to the company; and if he place a refusal to pay the loss wholly upon other grounds, it is a waiver of the right to defend a suit on the ground that such proofs were not made. *Aetna Insurance Co. v. Shryer*, 362

INTENTION.

See WILL, 2.

INTEREST.

See MORTGAGE, 4; TAXES, 7, 9.

INTERROGATORIES TO JURY.

See INSTRUCTIONS, 1; VERDICT, 1, 2.

Submission of.—It is not error to refuse to submit to the jury an interrogatory as to a question of fact not involved in the issues, or as to a question of law. *Trentman v. Wiley*, 33

INTOXICATING LIQUOR.

See NEGLIGENCE, 7.

1. *Sale Without License.—Indictment.*—An indictment for selling intoxicating liquor without license “to be drunk *and* suffered to be drunk in the defendant’s house, out-house, yard *and* garden,” is good on motion to quash; charging thus in the conjunctive it merely avers more than is necessary to make an offence, under section 5320, R. S. 1881. *Stockwell v. State*, 522
2. *Same.—Evidence.—Appurtenances.*—A platform and steps annexed to a room are appurtenances thereof, within the meaning of section 5320, R. S. 1881. *Ib.*
3. *Unlawful Sale.—Injury in Consequence of Intoxication.—Proximate Cause.—Liability for Results.—Negligence.*—An unlicensed liquor dealer furnished on Sunday intoxicating liquor to A. until he was helpless and unconscious, and in that condition placed him in his sleigh, to which was attached a quiet horse of the plaintiff which A. had in use. An accident, induced by the inability of A. to manage the horse, caused the latter to run away, whereby the horse was killed. *Held*, that the liquor seller was, by statute (R. S. 1881, sec. 5323), as well as at common law, liable for the value of the horse. *Dunlap v. Wagner*, 529
4. *Sale Without License.—Time.—Statute of Limitations.*—Time is not of the essence of the offence of selling liquor without license, and hence the time charged need not be strictly proved, but it will be sufficient to show that the act was done at any time within the statute of limitations. *Fowler v. State*, 538
5. *Evidence.—Instructions.*—Where the evidence shows that the defendant, not being licensed to retail intoxicating liquors, sold the prosecuting witness “one drink” of whiskey, and there was no evidence that “one drink” was less than a quart, there was no error in refusing to instruct the jury that the defendant could not be found guilty. In such case the court’s instruction to the jury, that before they could convict they must find, beyond a reasonable doubt, that the quantity sold was less than a quart, is a correct statement of the law applicable to the evidence. *Feigel v. State*, 580

ISSUE.

See SUPREME COURT, 18.

JEOPARDY.

See CRIMINAL LAW, 25, 26.

JUDGE.

See CITY, 3; COURTS, 2; PRACTICE, 14; SUPREME COURT, 20.

JUDGMENT.

See ATTACHMENT, 2, 3, 7; CRIMINAL LAW, 14, 20, 23; DECEDENTS' ESTATES, 12; DEMURRER TO EVIDENCE, 4; PARTNERSHIP, 5; PLEADING, 17; PRACTICE, 2, 13, 17; REDEMPTION, 1; REPLEVIN, 4; REPLEVIN BAIL; TOWN, 3; VERDICT, 4.

1. *Costs.—New Trial.*—The rendition of a judgment for costs, without relief from valuation laws, if erroneous, is not cause for a new trial.
Trentman v. Wiley, 33
2. *Execution.—Injunction.—Collateral Attack.*—An action to enjoin the enforcement of a judgment by execution is a collateral attack, and can be maintained only upon a showing that the judgment is void.
Krug v. Davis, 309
3. *Same.—Summons.—Service.—Default.*—It is not cause for enjoining the enforcement of a judgment taken upon default, that no summons was issued under the seal of the court as required by law, that no such summons was ever issued and served in any manner, and that the party did not appear, and had no summons served upon him to appear to the action.
Ib.
4. *Same.—Service of Process.—Sheriff's Return Conclusive.*—The return of the sheriff showing service of process being conclusive on the party, a judgment by default can be shown to be void for want of such service only by averment that the record does not show such return, and that there was in fact no such return.
Ib.
5. *Same.—Legal Presumptions, Comparative Strength of.*—The presumption of regularity in the final judgment of the court is stronger than the presumption that the sheriff did not make a false return of the process.
Ib.
6. *Same.—Seal of Court.*—A judgment by default is not void for want of the seal of the court upon the summons.
Ib.
7. *Decedents' Estates.*—An application to enforce a judgment against a decedent's estate, made under section 621, R. S. 1881, can not be objected to by the tenant of real estate against which the judgment is sought to be enforced on the ground that it fails to show whether or not there were assets in the hands of the administrator.
Cox v. Stout, 422
8. *Evidence.—Record Reinstated.*—Where the record of a judgment, which has been destroyed, has been reinstated, it is admissible to prove the judgment, without producing also the pleadings.
Ib.
9. *Same.—Injunction.*—In an application to enforce a judgment under section 621, R. S. 1881, it is not error to put in evidence a record showing that there had been an injunction restraining the sale on execution of lands to satisfy the judgment.
Ib.
10. *Collateral Attack.—Notice.*—A judgment can not be attacked collaterally for insufficient notice to a party, if it appear that there was some notice although defective.
Oppenheim v. Pittsburgh, etc, R. W. Co., 471
11. *Same.—Jurisdiction.—City Court.*—When a city court erroneously determines notice to a party to be sufficient, that determination can not be collaterally impeached.
Ib.

JUDICIAL COGNIZANCE.

See CRIMINAL LAW, 6; MORTGAGE, 5.

JUDICIAL SALE.

See DECEDENTS' ESTATES, 5, 6; HUSBAND AND WIFE, 7; MARRIED WOMAN, 3; SHERIFF'S SALE.

JURAT.

See CRIMINAL LAW, 3.

JURISDICTION.

See COUNTY COMMISSIONERS; CRIMINAL LAW, 39; JUDGMENT, 11; SUPREME COURT, 26.

JURY.

See CRIMINAL LAW, 1, 34, 35; INSTRUCTIONS TO JURY; NEGLIGENCE, 4; RECEIVER, 3; REPLEVIN, 1; SUPREME COURT, 25.

1. *Misconduct.—Verdict.—New Trial.*—After the jury had been instructed and placed in charge of a bailiff, some of them, understanding erroneously that the court had given them a short recess, separated from the rest; one drank a glass of beer, producing no intoxication; they held no conversation with any one about the case, and in four minutes all were in the jury room, where they stayed until the verdict was agreed upon.

Held, that there was no cause for a new trial. *Carter v. The Ford, etc., Co.*, 180

2. *Contract.—Construction.*—A jury is not at liberty to find the effect and meaning of a written contract; that is the duty of the court.

Dixon v. Duke, 434

JUSTICE OF THE PEACE.

See BOND, 3, 4; CRIMINAL LAW, 34; SUPREME COURT, 26.

LANDLORD AND TENANT.

See JUDGMENT, 7.

1. *Rent.—Former Adjudication.*—In a suit by a landlord for rent and possession, an answer of former adjudication is well met by a reply that the pending action is for rent accrued since the former trial.

Epstein v. Greer, 372

2. *Same.*—A tenant holding possession as such can not, as against his landlord, deny the title of the latter and thereby avoid paying rent. *Ib.*

3. *Lease.—Notice to Quit.*—Under a lease of buildings, at a specified rental, to be paid on a day certain, and of farming lands, to be paid for by a share of the crops, there being a failure to pay the rental for the buildings at the time fixed, which was before the maturity of the crops, the entire tenancy can not be terminated by a ten days' notice.

Ricketts v. Richardson, 508

4. *Same.—Forfeiture.*—A covenant by a tenant to keep down the briars, weeds and sprouts in the fence corners, does not give liberty to postpone its performance until the end of the term; but a breach would not enable the landlord to end the tenancy by a ten days' notice. *Ib.*

LARCENY.

See CRIMINAL LAW, 8 to 11, 42, 43.

LEASE.

See CONTRACT, 3; LANDLORD AND TENANT; PROMISSORY NOTE, 3, 4.

LIEN.

See ATTACHMENT, 7; CONTRACT, 13; DECEDENTS' ESTATES, 12; EXECUTION; MECHANIC'S LIEN; MORTGAGE; PARTNERSHIP, 6; REDEMPTION, 1; TAXES, 5, 8; VENDOR AND VENDEE.

Live-Stock.—Keeper's Lien.—Statute Construed.—Evidence.—Replevin.—Where, in an action of replevin, the evidence shows a contract whereby the defendant undertook, for a price stated, to keep fifty head of cattle for the plaintiff in a manner and for a time stated, and that the defendant performed the agreement, the jury is warranted in inferring

that the defendant was in the business of feeding live-stock and accordingly entitled, under section 5292, R. S. 1881, to a lien.

Bunnell v. Davisson, 557.

LIFE-ESTATE.

See WILL, 1.

LIQUOR LAW.

See INTOXICATING LIQUOR.

MALICIOUS TRESPASS.

See CRIMINAL LAW, 3 to 5, 45.

MANDATE.

See SCHOOL LAW.

1. *Public Officer.*—A public officer will not be compelled by mandate to do an act at the instance of a relator who does not show that he has an interest in the act sought to be coerced. *State, ex rel., v. Grubb, 213*
2. *Same.—Practice.*—The alternative writ of mandate to compel two or more acts, if not sufficient as to all, is bad on demurrer. *Ib.*

MARRIAGE.

See BASTARDY.

MARRIAGE CONTRACT.

1. *Instruction.—Duress.*—In a suit for breach of a marriage promise, an instruction which correctly states the facts necessary to be proven by the plaintiff, professing to do no more, is not erroneous for failure to inform the jury further that the promise would not bind the defendant if made under duress. *McCrum v. Hildebrand, 204*
2. *Same.—Evidence of Contract.*—An instruction in such case, which submits to the jury the conduct of the parties towards each other, as proper evidence to be considered in determining whether a promise of marriage existed, is proper; indeed, the jury may be told that a promise may be inferred from circumstances. *Ib.*
3. *Same.*—A promise of marriage, freely made, is not nullified by another made under duress. *Ib.*

MARRIED WOMAN.

See FRAUDULENT CONVEYANCE, 2, 3; HUSBAND AND WIFE; MECHANIC'S LIEN; MORTGAGE, 10, 11; PARTITION; REAL ESTATE, ACTION TO RECOVER, 1.

1. *Contract.—Mortgage.—Separate Real Estate.—Pleading.*—A complaint by a married woman to annul a mortgage made by her of her separate real estate, her husband joining, while the act of March 25th, 1879, was in force, which does not show the mortgage to be such as was prohibited by that act, is bad on demurrer. *Gregory v. Van Voorst, 108*
2. *Same.—Foreclosure of Mortgage Against Wife's Land.—Promissory Note.*—A mortgage by a married woman, her husband joining, of her lands acquired by gift, devise or descent, to secure a loan made by her, may be enforced if the debt be identified in the mortgage, though a note for the money made by her is void as a personal obligation. *Ib.*
3. *Foreclosure of Husband's Mortgage.—Sheriff's Sale of Lands.—When Wife's Inchoate Interest Vests.—Obligation of Contracts.—Constitutional Law.—Statute Construed.*—Upon the foreclosure of a mortgage on real estate, executed by the husband alone prior to August 24th, 1875, to secure a debt other than for purchase-money, and the sheriff's sale of the mortgaged premises, where the judgment of foreclosure was rendered, and the sale thereunder was made, subsequent to August 24th, 1875, the wife's inchoate interest in the mortgaged real estate will not vest and

become absolute in her, unless and until she shall survive her husband. In such a case, section 2508, R. S. 1881, can not be construed as applicable; for, if the section were applicable, its effect would be to impair the obligation of the mortgage contract, and, to that extent, the section would be unconstitutional and void. *Volz v. Randles*, 198, 601

4. *Statute of Frauds.—Vendor and Vendee.—Implied Promise.—Contract.—Consideration.*—A married woman joined her husband in the conveyance of his lands, in consideration of which the vendee orally agreed to convey to her a city lot, which he afterwards refused to do.

Held, that a complaint by the wife against the vendee for failure to perform his agreement, showing these facts, was good on demurrer.

Held, also, that the release by a wife of her inchoate interest in her husband's lands may be a valuable consideration.

Held, also, that these facts give rise to an implied promise by the vendee that he will return what he has received or its value, as being held by him on a consideration which has failed. *Jarboe v. Severin*, 496

5. *Same.—Husband and Wife.—Conveyance.—Presumption.*—Where a wife joins with her husband in the conveyance of his land, it will be presumed, in the absence of any special agreement to the contrary, that the inducement for the release of her inchoate right as to the grantee was the consideration paid by him for the land. *Ib.*

6. *Contract for Services.—Master and Servant.*—An agreement by a married woman to pay an attendant for services is void, and can not be enforced, although it was acknowledged by her after the death of her husband. An acknowledgment of an agreement does not constitute a promise to pay. *Candy v. Coppock*, 594

MASTER AND SERVANT.

See MARRIED WOMAN, 6; NEGLIGENCE, 3, 6.

MEASURE OF DAMAGES.

See APPEAL BOND; ATTACHMENT, 4, 5; NEGLIGENCE, 4; REPLEVIN, 2.

MECHANIC'S LIEN.

Married Woman.—Husband and Wife.—Where a married woman, owning a city lot, mortgaged it to raise money to improve it by the erection of a house thereon, the husband taking the money, and, with her knowledge and consent, erecting the building, employing another to plaster it, the necessary inference follows that the husband was either her agent or a contractor to build the house, and in either case the statute gives the plasterer a right to a mechanic's lien, by recording the proper notice. *Thompson v. Shepard*, 352

MEMBER OF FAMILY.

See HUSBAND AND WIFE, 10; PARENT AND CHILD.

MERGER.

See REDEMPTION, 1.

MILL.

See MORTGAGE, 8.

MITIGATION OF DAMAGES.

See ATTACHMENT, 6.

MISTAKE.

See DECEDENTS' ESTATES, 7 to 9; SHERIFF'S SALE, 3.

MORTGAGE.

See CHATTEL MORTGAGE; CONTRACT, 5, 11; MARRIED WOMAN, 1 to 3;

PLEADING, 13; PRINCIPAL AND SURETY, 2; PROMISSORY NOTE, 4; REDEMPTION, 1; WILL, 1.

1. *Consideration.—Vendor and Purchaser.—Partial Failure of Title.—Eviction.—Promissory Note.—Decedents' Estates.—Assignor and Assignee.—Priority of Liens.—Partition.*—Suit by an administrator to foreclose a mortgage for instalments of purchase-money of lands first maturing—several notes having been given. The widow filed a cross complaint for foreclosure of the same mortgage as to notes for later instalments, which had been bequeathed to her by the will of the decedent, and to establish priority thereof over the notes held by the plaintiff. Answer by the mortgagor to both that the consideration had failed in part, in this, that the decedent had conveyed the land to him by deed, with covenants, for \$5,000; that as to one-fifth, undivided, he had no title, the title being in H., which was so adjudged in a suit by H. for partition. *Held*, that the answer was good; showing a sufficient defence as to one-fifth of the purchase-money.
Held, also, that the judgment of partition in favor of H. was a constructive eviction.
Held, also, that while a defect of title can not be pleaded in bar of the foreclosure of a mortgage for purchase-money, it can be as a failure of the consideration of the notes given for the, title which would incidentally defeat the foreclosure.
Held, also, that though the notes held by the widow were last to mature, she was entitled to priority, as an assignee, and the failure of consideration must first fall upon the notes held by the administrator.
Wilber v. Buchanan, 42
2. *Res Adjudicata.—Decisions of Supreme Court.—Practice.—Conclusion of Law.—Exception.*—Where an action is brought to foreclose a mortgage in the form of a deed, and upon appeal to the Supreme Court it is held that the facts stated are sufficient to entitle the plaintiff to recover, such decision is binding upon the trial court and upon the Supreme Court on a second appeal, and if, upon a subsequent trial, the facts alleged are found and conclusions of law are stated, the defendant can not, by an exception to the conclusions, again raise such questions, as the decision of the questions, however presented, binds him.
Braden v. Graves, 92
3. *Same.—Vendor's Lien.—Promissory Note.—Recitals.—Estoppel.*—Where, in such action, the defendant seeks by counter-claim to enforce a vendor's lien upon the land for the amount of a note alleged to have been executed by the plaintiff for the land, and the court finds that the note was executed without consideration and concludes that the defendant is not liable upon it, an exception to the conclusion of law raises no question as to whether the recitals in the note estop the plaintiff to prove such fact.
Ib.
4. *Same.—Subrogation.—Payment of Prior Mortgages.—Interest.*—In such action the defendant, who is the purchaser of the equity of redemption, and who has paid prior mortgages, bearing interest at the rate of seven and ten per cent., is entitled to the amounts paid upon such mortgages, with interest thereon from the time of payment at the rates specified in such mortgages.
Ib.
5. *Real Estate.—School Fund.—Description.—Presumption.—Judicial Knowledge.*—Where a mortgage to the State describes lands by section, township and range, not giving the county or State where situated, it will be presumed that the lands are in this State, and from the description the court will judicially know the county.
Brown v. Ogg, 234
6. *Same.—University Fund.—Sale by State Auditor on Mortgage.—Notice.*—A failure by the Auditor of State to give the notice of sale which the statute, R. S. 1881, section 4610, requires, on default of a mortgagor

who has borrowed university funds, renders the sale void. So, also, if he sell to make more than the amount of principal, interest, damages and costs properly due. R. S. 1881, section 4611. *Ib.*

7. *Same.—Publication.—Costs.*—The statute, R. S. 1881, section 4610, requires that the notice of such sale should be published in one or more newspapers, not once merely, sixty days before the sale, but continuously during the whole of that period. *Semble*, that if the notice be published in one newspaper as required, and in another only a part of the time, the notice is sufficient; but in that case the expense of the notice in the latter paper is no part of the proper costs, and if it be included in the sum for which the land is sold, the sale will be void. *Ib.*
8. *Personalty and Realty.—Fixtures.—Mills.—Pleading.*—Where in an action to foreclose a mortgage describing as "personal property" the undivided half of a grist-mill, stationary boiler and engine, and a stationary saw-mill, an answer that the property was a stationary steam saw and grist-mill, that the defendant purchased the same in good faith without notice, and that the mortgage had been recorded only in the record of chattel mortgages, is insufficient and does not show that the property was real estate. *Price v. Malott, 266*
9. *Foreclosure of, Securing More than One Note.—Complaint.*—In an action to foreclose, it is proper to embrace in a single paragraph of complaint the mortgage and all the notes secured by it, and if a copy of one note only be given, the complaint may nevertheless be good upon demurrer. *Buck v. Axt, 512*
10. *Same.—Husband and Wife.—Duress.*—In an action to foreclose a mortgage against a husband and wife, it is not a good plea of duress by the wife, that she was induced to sign the mortgage by the threats of the mortgagee to pursue legal remedies against the husband (to collect the debt secured by the mortgage), and to sell them out of house and home. *Ib.*
11. *Same.—Consideration.—Pre-existing Debt.*—A mortgage to secure a pre-existing debt rests upon a sufficient consideration, both as to the debtor and as to his wife or any other who may have joined in making the mortgage. *Ib.*
12. *Same.—Description.—Auditor's Sale.*—A description of land in a school fund mortgage as "the northeast part" of a specified tract, "containing ninety acres," is insufficient, and an auditor's sale made thereunder is invalid. *Ib.*

MUNICIPAL CORPORATION.

See BRIDGES; CITY; HUSBAND AND WIFE, 6; NEGLIGENCE, 1; PRINCIPAL AND SURETY, 1; TAXES, 7; TOWN.

NAMES.

See PLEADING, 13.

NATIONAL BANKS.

See TAXES, 1.

NEGLIGENCE.

See ASSAULT AND BATTERY, 1; DECEDENTS' ESTATES, 7 to 9; INTOXICATING LIQUOR, 3; TOWN.

1. *Town.—Defective Street.—Complaint for Personal Injury.*—A complaint against a town for a personal injury, suffered by reason of a fall in the street, must show that the injury was caused by some specified act of negligence or omission of duty on the part of the town; and a charge that the town, while grading a street, caused the digging of a hole ten inches deep and twelve inches in diameter, which it negligently permitted to remain in the street for ten days, uncovered and unguarded,

and that, while walking along the street, the plaintiff, without negligence on her part, stepped into the hole and was thrown down and injured, is insufficient. *Town of Rushville v. Poe, 83*

2. *Same.—Contributory Fault.*—A general averment, in a complaint for negligent injury, that the injury was suffered without fault on the part of the plaintiff, is sufficient. *Ib.*
3. *Evidence.*—In an action against a railroad company for placing a hand-car upon a public highway, in consequence of which the plaintiff was injured while passing over the highway at night, evidence tending to show that the defendant's servants, while executing the lawful orders of the defendant, negligently left the car on the highway, is admissible. *Pittsburgh, etc., R. W. Co. v. Sponier, 165*
4. *Same.—Personal Injury.—Measure of Damages.*—In a suit for personal injury, resulting from negligence, the jury should consider the bodily pain and sickness, the extent of permanent disability, and the anxiety and distress of mind fairly caused by the injury. *Ib.*
5. *Same.—Excessive Damages.*—An old lady aged sixty-two, by the defendant's negligence, without intention, was injured by having the bones of an arm broken, which resulted in a protracted effort at cure, without success, so that she could never again perform her usual domestic duties.

Held, in an action for such injury, that a verdict for \$2,500 damages was not so excessive as to justify a new trial. *Ib.*

6. *Sufficiency of Evidence.—Verdict.—Master and Servant.—Consignor and Consignee.*—A., of Cincinnati, shipped goods to New Albany, to be received and stored by B. They were received by C., upon his wharf-boat to be kept for A. until removed. The servants of B., in removing the goods from the wharf-boat, allowed part of them to fall into the river, whereby they were lost.

Held, in a suit by A. against C. for negligence, that this evidence did not support a verdict against C. *Reamer v. Davis, 201*

7. *Contributory Fault.—Intoxication.*—To an action to recover for injuries sustained by the plaintiff to his property on account of the wilful, negligent and careless conduct of the defendant, an answer admitting the injuries and averring that, at the time they were committed, the defendant was intoxicated by liquor sold to him by the plaintiff, who was a licensed liquor seller, is insufficient to constitute a defence.

Cassady v. Magher, 228

NEW TRIAL.

See ASSIGNMENT OF ERROR, 2, 5; CRIMINAL LAW, 28; DECEDENTS' ESTATES, 4; JUDGMENT, 1; JURY, 1; PRACTICE, 3, 7, 8, 11; SUPREME COURT, 7, 8, 10, 16.

1. *Surprise.—Witness.*—It is not ordinary prudence to rely upon the unsworn statement of an adversary's witness as to what will be his testimony; and surprise resulting from such reliance, whereby a party goes to trial without witnesses to prove the real truth, is not cause for a new trial. *Pittsburgh, etc., Co. v. Sponier, 165*
2. *Ejectment.—New Trial as of Right.—Waiver of Exceptions.*—By taking a new trial, in an action of ejectment, as a matter of right upon payment of costs, the party waives exceptions to rulings made at the trial had. *Bitting v. Ten Eyck, 357*
3. *Same.—New Parties Admitted After First Trial.*—When, in an action of ejectment against one, the defendant had taken a new trial as matter of right, and thereupon others were made defendants upon their own motion, and a second trial had, the new parties were not entitled to a new trial as of right. *Ib.*

4. *Surprise.—Newly Discovered Evidence.*—There must be proper affidavits to show surprise and newly discovered evidence as causes for a new trial, and these must be brought into the record by bill of exceptions, else the Supreme Court can not review the ruling of the court below on the motion. *Heaton v. White, 376*
5. *Practice.—Presumption.*—Where a motion for a new trial is not made at the term at which the cause is tried, but at the next term such motion is filed on leave, without objection, consent thereto will be presumed, and the motion will be in the record. *Trentman v. Swartzell, 443*
6. *Causes.*—"Error of law occurring at the trial as hereafter set forth, and excepted to by the defendant," is not sufficiently specific, as a cause for a new trial, to present any question. *Lovely v. Speisshoffer, 454*

NOTICE.

See BILL OF EXCHANGE; JUDGMENT, 10, 11; LANDLORD AND TENANT, 3, 4; MORTGAGE, 6, 7; PROMISSORY NOTE, 2; SHERIFF'S SALE, 1, 2.

NUISANCE.

See TOWN.

1. *Horse Stable.—Injunction.*—A stable is not a nuisance *per se*, and a court of equity will not, at the instance of an adjoining lot-owner, whose residence and well are twenty-five or thirty feet distant from defendant's wood and carriage house, erected upon his own premises, enjoin him from constructing a horse stable therein, where the stable may never be used, and where its use may not injuriously affect such person, his family or his property. *Keiser v. Lovett, 240*
2. *Same.—Complaint.*—A complaint, in an action to enjoin the erection of a horse stable upon an alley by an abutting property-owner, alleging the obstruction of the alley by such building, and in such proximity to the plaintiff's residence that, if used for such purpose, it will endanger the health of himself and family, and render his property useless as a residence, is sufficient on demurrer. *Ib.*

OCCUPYING CLAIMANT.

See REAL ESTATE, ACTION TO RECOVER, 1, 2.

OFFICE AND OFFICER.

See ATTORNEY GENERAL; BOND, 3, 4; CITY, 3; COUNTY COMMISSIONERS; COUNTY TREASURER; COURTS, 2; CRIMINAL LAW, 6, 7, 34; MANDATE, 1; PROMISSORY NOTE, 11, 12; SCHOOL LAW; SHERIFF'S SALE; SUPREME COURT, 20.

OPEN AND CLOSE.

See PRACTICE, 1.

ORDER.

See BILL OF EXCHANGE.

OWNERSHIP.

See CRIMINAL LAW, 10; EVIDENCE; PROMISSORY NOTE, 5; REAL ESTATE, ACTION TO RECOVER, 3.

PARDON.

See CRIMINAL LAW, 17, 18.

PARENT AND CHILD.

See BASTARDY; DESCENTS; HUSBAND AND WIFE, 10.

Contract with Grandparent for Child's Maintenance not Implied.—Where a child is taken to be brought up in the family of its grandfather, the father, without express promise, is not liable for the child's maintenance.

Davis v. Davis, 157

PARTIES.

See ATTACHMENT, 7; CORPORATION; DECEDENTS' ESTATES, 10, 11; NEW TRIAL, 3; PLEADING, 9; PRACTICE, 17, 18; PROMISSORY NOTE, 9; REAL ESTATE, ACTION TO RECOVER, 1; SUPREME COURT, 21, 22.

PARTITION.

See MORTGAGE, 1; SUPREME COURT, 18.

Descents.—Widow.—Conveyance.—Statute Construed.—Husband and Wife.—A woman, married a second time, holding by descent an undivided third of the lands of a former husband, may, without suit, make fair partition with the children of her former husband, and deeds executed by her and her second husband, to carry out such partition, are not an alienation prohibited by section 2484, R. S. 1881, as it stood prior to its amendment in 1879; and after such partition, and possession taken by the parties, she ceased to own any interest in the lands allotted to the children of the former husband. *Bumgardner v. Edwards, 117*

PARTNERSHIP.

1. *Suits between Partners.*—A partner can not maintain a suit against his co-partner for a share of the profits, nor upon a claim arising from the partnership business, until there has been an accounting and final settlement. *Meredith v. Ewing, 410*
 2. *Same.—Accounting.*—A partner may compel an accounting, and may recover the sum found due him upon final adjustment of the partnership affairs. *Ib.*
 3. *Same.—Contract of Dissolution.*—A partner may compel compliance with a contract of dissolution and recover a sum due him under its provisions. *Ib.*
 4. *Same.—Pleading.*—M. and E., having been partners, made a contract of dissolution, by the terms of which M. took the personal property of the firm, at a fixed price, and assumed its liabilities, it being agreed that, if the latter exceeded the price of the property, E. should pay half of the excess, and, if less, M. should pay E. half of the difference. The debts were in excess of the price of the property. A complaint by M. against E. to compel the latter to pay half of such excess, which does not allege that M. has paid the whole, is bad on demurrer. *Ib.*
 5. *Judgment.—Verdict.—Attachment.—Fraud.*—Complaint against S. and V., partners, upon an account, and to subject to the satisfaction thereof certain goods alleged to have been fraudulently transferred by S. to W. S., also a defendant. There was also an attachment by virtue of which the goods were seized and sold. V. filed a cross complaint averring the same facts alleged in the complaint. Other creditors became parties under the attachment; and, issue being taken upon the complaint and cross complaint, the jury found certain sums due from the partners to the respective plaintiffs, creditors, and for them on the question of fraud against S., and against them as to W. S., and on the cross complaint, they found for V. the plaintiff therein.
- Held*, that the creditors were not entitled to an order for the distribution of the proceeds of the goods; that W. S. was entitled to an order giving the proceeds to him, upon giving bond, etc., and the creditors were entitled to personal judgments against S. and V. *Trentman v. Swartzell, 443*
6. *Same.—Lien of Creditors.*—When a partner sells his interest in partnership goods to a co-partner, the latter may apply the goods to his individual debts, and there is no lien of partnership creditors to interfere. *Ib.*

PAYMENT.

See MORTGAGE, 4; PRACTICE, 1; SALE, 2.

PERSONAL INJURY.

See ASSAULT AND BATTERY; CITY, 1; NEGLIGENCE.

PERSONAL PROPERTY.

See ATTACHMENT, 1 to 7; DECEDENTS' ESTATES, 10; EVIDENCE; EXECUTION; FRAUDULENT CONVEYANCE, 1; HUSBAND AND WIFE, 3, 4, 8, 11, 12; MORTGAGE, 8; PARTNERSHIP; PRINCIPAL AND SURETY, 2; REPLEVIN; SALE.

PLEADING.

See APPEAL BOND; ATTACHMENT, 1 to 3; BOND, 1 to 3; CONTRACT, 2; CONVERSION; CRIMINAL LAW, 3, 6, 8 to 10, 13 to 27, 30, 31, 36 to 39, 42 to 45; DECEDENTS' ESTATES, 1, 3, 14; FRAUDULENT CONVEYANCE; INTOXICATING LIQUOR, 1; MARRIED WOMAN, 1, 4; MORTGAGE, 1, 3, 8 to 10; NEGLIGENCE, 1, 2; NUISANCE, 2; PARTNERSHIP, 4; PRINCIPAL AND SURETY, 1; PRACTICE, 18; PROMISSORY NOTE, 2, 3, 13, 14; QUIETING TITLE; REAL ESTATE, ACTION TO RECOVER, 3 to 5; RECEIVER, 4; SEDUCTION, 1; STATUTE OF LIMITATIONS; SUPREME COURT, 3, 6, 18; TAXES, 8; TOWN, 1.

1. *Estoppel.—Covenants.—Written Instrument.—Exhibit.*—A reply whereby the plaintiff seeks to estop the defendant from making a defence by him pleaded, by reason of written covenants of the defendant to the plaintiff, that the facts were other than as the defendant has pleaded, but not exhibiting a copy of the instrument containing the covenants, is bad. *Ashley v. Foreman, 55*
2. *Same.—Bad Reply to Bad Answer.*—A bad reply to a bad answer will be held good on demurrer. *Ib.*
3. *Written Instrument.—Excuse for not Giving Copy.*—If a pleading is based on a written instrument, a copy should be exhibited; but it is a sufficient excuse for not giving a copy, that the depositary of the writing had refused to deliver it or to furnish a copy. *Wells v. Sutton, 70*
4. *Complaint.—Certainty.—Demurrer.*—If a complaint, construed according to the fair import of its averments, makes a cause of action, it will resist a demurrer, though it be uncertain. *Himes v. Langley, 77*
5. *Intendments.*—If the allegations of a pleading be ambiguous, uncertain or defective, they must be construed more strongly against the pleader. *Pond v. Sweetser, 144*
6. *Fraud.*—In a suit for relief against fraud, the complaint alleging actual fraud and facts amounting to constructive fraud, an answer, denying the actual fraud and the facts amounting to constructive fraud, is good on demurrer. *Carter v. The Ford, etc., Co., 180*
7. *Duplicity.*—Duplicity is no ground of demurrer under the code. *Ib.*
8. *Argumentative Denial.*—There is no error in overruling a demurrer to a paragraph of answer amounting to an argumentative denial, the general denial being also pleaded. *Ib.*
9. *Parties.—Practice.*—As a rule, where two or more join in an action, the complaint must show a right of action in favor of all the plaintiffs. *Hyatt v. Cochran, 231*
10. *Facts and Evidence.*—A pleading should state the issuable facts, and not merely evidentiary facts. *Allen v. Frazer, 283*
11. *Facts and Conclusions of Law.*—A pleading should state facts, not legal conclusions merely. *Krug v. Davis, 309*
12. *Averment.*—The allegation in a pleading of circumstances from which a fact may be inferred is not equivalent to an averment of the fact. *McNaughton v. City of Elkhart, 384*
13. *Complaint to Foreclose Mortgage.—Decedents' Estates.*—The names of the parties to a suit, being named in the first paragraph of a complaint,

need not be repeated in subsequent paragraphs; so that in an action to foreclose several mortgages executed by a decedent, a second paragraph of the complaint alleging that he died, "leaving the widow and heirs at law named in the first paragraph of this complaint," is not objectionable.

Thompson v. Edwards, 444

14. *Prayer for Relief*.—A complaint, alleging facts which entitle the plaintiff to some relief, is good on demurrer, and is not vitiated by a prayer for the wrong relief. *Lovely v. Speisshoffer, 455*
15. *Complaint*.—*Written Instrument*.—*Cause of Action*.—*Practice*.—Where a complaint professes to be founded upon a written instrument, and to rely on it as the cause of action, the plaintiff can not ask that it be held sufficient as setting forth some other right of action. *Johnston v. Griest, 504*
16. *Demurrer*.—A demurrer admits only such allegations of a pleading as are properly and sufficiently pleaded. *Ib.*
17. *Complaint for Relief from Judgment by Default*.—A complaint, under section 99 of the code, R. S. 1881, sec. 396, for relief from a judgment by default, should show, it seems, the nature of the cause of action on which the judgment was rendered, and a pertinent and good defence thereto. *Lee v. Basey, 543*
18. *Evidence*.—*Uncertainty*.—The averments of a pleading must be clear and unequivocal; but the evidence in support thereof may be sufficient, though uncertain or ambiguous. *Bunnell v. Davisson, 557*
19. *Answer or Counter-Claim*.—*Supreme Court*.—*Partial Answer*.—Where a pleading, properly a counter-claim, is treated below by court and counsel as an answer in bar, it must be so considered by the Supreme Court; and if it purports, yet fails, to answer the entire complaint, it is bad on demurrer for the want of sufficient facts. *Hancock v. Fleming, 571*
20. *Reply*.—A bad reply is a good enough reply to a bad answer. *Ib.*
21. *Complaint*.—*Common Count*.—*Account*.—A complaint upon an account, in the general form of the common count formerly in use, if accompanied by a proper bill of particulars, is good on demurrer, under the code. *Oliver v. Gorham, 598*

POSSESSION.

See TAXES, 4, 5; WITNESS, 2.

PRACTICE.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CONTINUANCE; CRIMINAL LAW, 8, 11 to 29, 32 to 35, 38 to 41; DEMURRER TO EVIDENCE; INSTRUCTIONS; INTERROGATORIES; JUDGMENT, 1; JURY; MANDATE, 2; MORTGAGE, 2, 3; NEW TRIAL; PLEADING, 3, 6, 8, 9, 14, 15; PRINCIPAL AND SURETY, 1; PROMISSORY NOTE, 14; REAL ESTATE, ACTION TO RECOVER, 5; RECEIVER, 3, 4; SPECIAL FINDING; STATUTE OF LIMITATION; SUPREME COURT; TAXES, 8; VERDICT.

1. *Burden of Proof*.—*Open and Close*.—*Payment*.—A plea of payment to an action on account, where no admission of the plaintiff's cause of action is made, does not entitle the defendant to open and close the evidence and argument upon the trial, the burden of the issue being upon the plaintiff. *Wright v. Abbott, 154*
2. *Judgment*.—*Exception*.—*Recital by Clerk*.—The recital of the clerk, following the entry of a judgment, that objection was made and exception taken to the rendition thereof, is not sufficient to present any question concerning the decree in the Supreme Court. *McClain v. Sullivan, 174*
3. *Argument of Counsel*.—*Bill of Exceptions*.—*Motion for New Trial*.—In order to save an exception to the action of the court in reference to the argument of counsel, the facts must be stated in a bill of exceptions;

- it is not enough that they be stated in the motion for a new trial, or in affidavits in support of that motion. *Choen v. State, 209*
4. *Same.*—Occurrences in the presence of the court must be stated in the bill of exceptions; but, in case of doubt, the judge may receive affidavits or other proof to enable him to settle the bill. *Ib.*
 5. *Same.*—Improper speech by counsel would seem to be "misconduct of the prevailing party," and can not be made available as an irregularity of the court unless by an exception to the court's refusal to take proper action moved for at the time of the misconduct. *Ib.*
 6. *Argument of Counsel.*—In civil causes, where there are no questions of fact in the evidence, the court may refuse to permit argument to the jury. *Heagy v. State, ex rel., 260*
 7. *Bill of Exceptions Filed After Term.*—*New Trial.*—A ruling made during the trial of a cause can not be preserved by bill of exceptions filed after the term, unless time was given within which to file it, during the term at which the ruling was made; nor can the court at a subsequent term, though the motion for a new trial was not passed upon until such term, preserve its ruling made at a former term, by granting time within which to file bills of exceptions. *Indianapolis, etc., R. R. Co. v. Pugh, 279*
 8. *Same.*—*Evidence.*—*Instructions.*—*Record.*—If a motion for a new trial is passed upon at a term subsequent to the term of trial, the court may then grant time within which to file a bill of exceptions, embracing the evidence and the ruling upon the motion, but such bill will not preserve any ruling made during the trial, and instructions found only in such bill will not be regarded as a part of the record. *Ib.*
 9. *Writ Coram Nobis.*—An issue of fact may be formed upon a petition for a writ *coram nobis*, and when so formed may be tried as other issues of fact are tried. *Sanders v. State, 318*
 10. *Same.*—*Facts Admitted.*—Where no issue is made, and the facts are conceded, it is the duty of the court to apply the law to the facts. *Ib.*
 11. *Real Estate, Action to Recover.*—*New Trial as of Right.*—*Oral Motion.*—During the term at which a judgment for the recovery of real estate has been rendered, a new trial as of right upon payment of costs may be granted upon oral motion. *Cox v. Dill, 334*
 12. *Same.*—*Witness.*—A party, to present any question upon the refusal of the court to permit his witness to answer an interrogatory, should inform the court what he expects to prove. *Ib.*
 13. *Appeal.*—*Review of Judgment.*—The prosecution to final judgment of a complaint for review bars an appeal from the original judgment. *Traders' Ins. Co. v. Carpenter, 350; La Caisse Generale, etc., v. Carpenter, 602*
 14. *Change of Judge.*—*Record of Appointment of Other Judge.*—When a change is taken from the presiding judge, and another judge is called, the latter may proceed in the case before the record of his appointment has been made up and signed. *Bitting v. Ten Eyck, 357*
 15. *Error in Evidence Cured by Instruction.*—An error in admitting improper evidence may be cured by an instruction which, in effect, directs the jury to disregard such evidence. *Evansville, etc., R. R. Co. v. Montgomery, 494*
 16. *Finding.*—*When Court May Hear Further Evidence After Entry of.*—*Attorney's Fees.*—Where, in an action upon a promissory note, a trial is had by the court, the finding announced, and entered on the docket, leaving a blank for the insertion of the amount of the recovery when computed, the court may, after overruling motions for a new trial and in arrest, hear evidence, over defendant's objection, in respect to the amount of the attorney's fee stipulated for in the note. *Maynard v. Shorb, 501*

17. *Action upon Joint Contract.—Dismissal as to One of Two or More Defendants.—Review of Judgment.*—The dismissal of an action as to one of the defendants served with process in an action upon a joint obligation is no cause for a review of the judgment entered against the other defendants. *Lee v. Basey, 543*
18. *Same.—Abatement.—Defect of Parties.—Demurrer.—Waiver.*—A defect of parties, if apparent on the face of the complaint, is cause for demurrer; otherwise it must be pleaded, and, if not taken advantage of in either of these ways, is waived. *Ib.*
19. *Finding by Court.—Harmless Error.*—When a cause is tried by the court without the intervention of a jury, its finding takes the place of a verdict, and can not be afterwards vacated or changed at the pleasure of the court; but a party not injured thereby can not maintain a suit to set aside such unauthorized proceeding. *Wray v. Hill, 546*

PREAMBLE.

See CONSTITUTIONAL LAW, 1.

PRESUMPTION.

See CONTRACT, 2; CRIMINAL LAW, 2; HUSBAND AND WIFE, 3; JUDGMENT, 5; MARRIED WOMAN, 5; MORTGAGE, 5; NEW TRIAL, 5; SUPREME COURT, 11.

PRINCIPAL AND AGENT.

See INSURANCE; MECHANIC'S LIEN; PRINCIPAL AND SURETY, 1; PROMISSORY NOTE, 5 to 7; TOWN, 4.

PRINCIPAL AND SURETY.

1. *Bond.—Agent.—Town.—Conversion.—Release of Surety.—Pleading.—Consideration.—Bonds.—Estoppel.—Fraud.—Demand.—Accounting.—Practice.—Delivery.*—An incorporated town, having bonds outstanding, issued to raise funds to erect a school-house, executed new bonds at a lower rate of interest, with a view to refund its debt, and appointed an agent to sell them. Afterwards the agent returned a part of these, and then, in consideration that he might retain those not returned, and that those returned would be again entrusted to him to negotiate and with the proceeds take up the old bonds, he gave bond with sureties, conditioned to perform said duties, and to account after a fixed date, it being recited in the bond that these securities were "this day delivered" to him. He became a defaulter and fled to parts unknown.
Held, that a complaint by the town on the bond, alleging the above facts, was good on demurrer.
Held, also, that the bond was executed on a concurrent and not a past consideration.
Held, also, that neither the agent nor his sureties could question the validity of either the old or new bonds, or the right of the town to the proceeds of the latter.
Held, also, that, the agent having absconded to parts unknown, a demand upon him was excused.
Held, also, that an answer by the sureties, that before the commencement of the suit it was known to the plaintiff that the agent had converted the bonds to his own use, and that it did not inform the sureties, was bad on demurrer.
Held, also, that an answer, denying that any demand for an accounting had been made on the agent, was bad on demurrer.
Held, also, that an answer by the sureties, denying the delivery of the bond sued on, is embraced in the general denial, and where the latter is pleaded there is no available error in sustaining a demurrer to the former.
Held, also, that an answer by the sureties, that the plaintiff knew and con-

cealed from them the fact that the agent had, before the bond was executed, disposed of the securities not returned, and also represented to them that he then had them in his hands, whereby they were deceived and induced to become sureties, was not embraced in the general denial, nor in an answer alleging want of consideration, and was a good defence."

Held, also, that by the terms of the bond the sureties were liable only for the securities delivered to the agent on and after its date.

Wilson v. Town of Monticello, 10

2. *Contribution.—Subrogation.—Mortgage.*—A. was indebted by promissory notes to a number of persons, on one of which B. and C. were his sureties, on several others B. only was surety, and on others D. only was surety. Afterwards A. made to B. and D. a chattel mortgage, to secure the payment of all his said debts, reserving the right to possess the property and to sell it, applying the proceeds in payment of said debts, which was done in part. C. was compelled to pay the demand on which he and B. were joint sureties. Suit by C. against B. and D. for the amount he had paid.

Held, that the acceptance of the mortgage did not impose upon B. and D. any joint obligation as sureties upon all the debts mentioned in the mortgage.

Held, also, that the mortgage was a security for all said debts, *pro rata*, so that C., having paid the debt on which he and B. were co-sureties, became entitled to the share applicable to that demand.

Held, also, that B. was liable to C. for contribution, as a co-surety.

Held, also, that D. was not so liable to C., and, not having received more than his proper share of the mortgaged goods, was not liable at all to him.

Whiteman v. Harriman, 49

PRIORITY OF LIENS.

See MORTGAGE, 1; REDEMPTION, 1.

PROMISE.

See CONTRACT, 9, 10, 12; DECEDENTS' ESTATES, 6; HUSBAND AND WIFE, 2, 10; MARRIAGE CONTRACT; MARRIED WOMAN, 4, 6; PARENT AND CHILD.

PROMISSORY NOTE.

See CONTRACT, 9, 11, 12; CONVERSION; DECEDENTS' ESTATES, 2 to 4, 6, 8, 9; MARRIED WOMAN, 2; MORTGAGE, 1, 3, 4, 9; PRACTICE, 16; PRINCIPAL AND SURETY, 2; VENDOR AND VENDEE.

1. *Contract of Assignor.—Warranty.*—The contract of the assignor of a promissory note not payable in bank is a warranty that the maker is liable thereon and able to pay it, and the assignee, under section 5504, R. S. 1881, may, having used due diligence to collect from the maker, sue his immediate or any remote assignor. *Huston v. First Nat'l Bank*, 21
2. *Remote Assignee.—Defence.—Set-Off.—Negative Averment.—Burden of Proof.*—In section 5504, R. S. 1881, it is provided that, in a suit against a remote assignor of a note not payable in bank, he shall have any defence which he might have had in a suit brought by his immediate assignee. In a suit by the assignee against the remote assignor of the note, where the defendant pleads a set-off against his immediate assignee, he must aver that he had no notice of the assignment to the plaintiff when he acquired such set-off; but, in proof, the burden of showing notice to the defendant of such assignment rests on the plaintiff. *Ib.*
3. *Consideration.—Lease.—Assignment.—Eviction.*—To a suit on a promissory note payable to the plaintiff, the defendant answered failure of consideration, in that the consideration was the assignment to him by

- A. of a lease which had been forfeited, and that the landlord had by suit evicted the defendant therefrom.
- Held*, that the answer was bad on demurrer, it not appearing that there was fraud or any covenants in the assignment. *Ashley v. Foreman*, 55
4. *Same.—Mortgage.—Release.*—A. held a leasehold estate which he had mortgaged to the plaintiff, and thereupon he assigned the lease as to a portion of the lands to the defendant, who, in consideration that the plaintiff released the mortgage to the portion so assigned, with the consent of A., made the note in suit payable to the plaintiff.
Held, that whether the plaintiff received the note as collateral security for the debt of A. or as payment thereof, the consideration, as between the plaintiff and defendant, was the release of the mortgage. *Ib.*
 5. *Action by Endorsee.—Plea of Property in Another.—Ownership.—Attorney.*—It does not show a defence to an action on a note by an endorsee to aver that it was endorsed to the plaintiff by one who, as attorney, took the note for his client and without authority caused it to be made payable to his own order. *Wells v. Sutton*, 70.
 6. *Same.—Principal and Agent.—Apparent Authority.*—If the owner of a promissory note, drawn payable to his agent, leaves the note in the agent's possession, and the latter endorses it to an innocent purchaser, the owner can not dispute the transfer. *Ib.*
 7. *Same.—Fraud.—False Representations Must be Material.*—It is no defence to a note made payable to an attorney of the owner, that the attorney falsely represented that his client had a cause of action against the maker for criminal intimacy with the client's wife, and had papers in the hands of an attorney at Piqua, Ohio, to begin suit for \$20,000, unless a compromise could be made, etc. The defendant, being necessarily cognizant of the facts, had no right to be influenced by such representations. *Ib.*
 8. *Same.—Criminal Conversation.—Damages.—Contract for Silence.—Defence.*—It is a good defence to a suit on a note given in settlement of damages claimed for criminal intimacy with the wife of the payee, that as a part of the settlement the parties agreed in writing that the note should be void if the payee should ever speak of such intimacy, and that he had broken this agreement. *Ib.*
 9. *Assignment.—Collateral Security.—Endorsement.*—An assignee of a promissory note who has re-assigned the note to his assignor, as collateral security, can not, while the latter so holds the note, maintain a suit on the endorsement. *Aliter*, after the debt secured is satisfied. *Smith v. Felton*, 223
 10. *Same.—Duty of Holder of Collateral Security to Sue.*—One to whom a note is delivered as collateral security is not bound to sue thereon if he be certain that a suit would be fruitless. *Ib.*
 11. *Gravel Road Corporation.—Contracts with Officers.*—A turnpike company is authorized by statute, R. S. 1881, section 3653, to borrow money of any officer thereof for use in making its road, and to execute a promissory note therefor. *Lebanon, etc., G. R. Co. v. Adair*, 244
 12. *Same.—Officer de Facto.*—After the lawful election of other directors, and their organization as a board, a note made by the old board (still acting as such, but as usurpers) to its president, and signed by him as such, with the other officers, is unauthorized, and is not the note of the corporation. *Ib.*
 13. *Consideration.—Fraud.—Reply.—Estoppel.*—When fraud, in respect to the consideration, is pleaded to an action upon a note, it is not a good reply that when the plaintiff was about to purchase the note, the defendant, in answer to an inquiry, said "all right," it not appearing that the defendant then knew of the fraud. *Allen v. Frazee*, 283

14. *Agreement for Attorney's Fees.—Demurrer.*—A void stipulation for attorney's fees in a promissory note does not invalidate the note, and consequently a demurrer to a complaint on the note does not bring in issue the validity of the stipulation. *Maynard v. Mier, 317*

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 6, 7.

PUBLIC POLICY.

See SEDUCTION.

PUBLIC SCHOOL.

See SCHOOL LAW.

PUBLICATION OF NOTICE.

See MORTGAGE, 7; SHERIFF'S SALE, 2.

QUESTION OF FACT.

See CHATTEL MORTGAGE, 2; CRIMINAL LAW, 1.

QUIETING TITLE.

See TAXES, 2, 3, 8.

Complaint.—A complaint to quiet title which avers title and possession in the plaintiff, and that the defendant claims title or an interest, the value of which is unknown to the plaintiff, which clouds the plaintiff's title and impairs its market value, is good on demurrer. So, also, if the character of the defendant's claim be alleged with facts showing its invalidity. *Brown v. Ogg, 234*

RAILROAD.

See NEGLIGENCE, 3, 4.

1. *Killing Stock.—Fencing.*—Where, in an action against a railroad company for the value of stock killed by the cars of the defendant, the evidence shows that the stock went upon the track at a place where it was unfenced, but where a fence could have been properly maintained, the company is liable. *Louisville, etc., R. W. Co. v. Zink, 219*
2. *Appropriation of Land for Right of Way.—Damages.—Evidence.—Opinion of Witness.—Instruction.*—In a proceeding by a railroad company to appropriate a strip of land for its right of way through a farm, it is not error to instruct the jury that they may consider the opinions of witnesses as to the value of the land immediately before the appropriation, and the value of the several parcels immediately after the appropriation, for the purpose of determining the damages sustained by the appropriation. *Indianapolis, etc., R. R. Co. v. Pugh, 279*

REAL ESTATE.

See ATTACHMENT, 8; CONTRACT, 3 to 5; DECEDENTS' ESTATES, 5, 6; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE, 5, 6, 7, 12; JUDGMENT, 7, 9; LANDLORD AND TENANT; MARRIED WOMAN; MECHANIC'S LIEN; MORTGAGE; PARTITION; RAILROAD, 2; REDEMPTION; QUIETING TITLE; SHERIFF'S SALE; TAXES; VENDOR AND VENDEE; WITNESS, 2.

REAL ESTATE, ACTION TO RECOVER.

See NEW TRIAL, 2, 3; PRACTICE, 11; RECEIVER, 2; SHERIFF'S SALE, 4; TAXES, 8; WITNESS, 2.

1. *Real Estate.—Use and Occupation.—Husband and Wife.—Parties.—Statute Construed.*—Section 794, 2 R. S. 1876, p. 313, does not permit the joining of a wife as plaintiff in an action to enforce a right or remedy belonging solely to the husband, as for the use and occupation of his land. *Hyatt v. Cochran, 231*

2. *Same.—Occupying Claimant.—Set-Off for Improvements.—Counter Set-Off for Prior Use and Occupation.—Statute of Limitations.—Statute Construed.*—Under section 1058, R. S. 1881, a recovery for the use and occupation of land can be had for no more than six years prior to the commencement of the action therefor; but if the defendant asks a set-off for the value of improvements, the plaintiff may have a counter set-off for use and occupation of the premises before the commencement of the six years for which there may be a direct recovery. *Ib.*
3. *Ejectment.—Complaint.—Title.*—A complaint for the possession of lands, which, by the facts averred, shows title in the plaintiff, without stating the conclusion that he is owner, is good on demurrer. *Lovely v. Speisshoffer, 454*
4. *Complaint.—Description.*—A tract of land situate, etc., known as a part of the J. W. farm, in fractional section, etc., containing, etc., is not a sufficient description; and a complaint to recover real estate by such description may be dismissed. *Hammond v. Stoy, 457*
5. *Same.—Discretion of Court.*—If, in a complaint to recover real estate, the description of the land be valid, but uncertain or obscure, the court may require that it be made more specific. *Ib.*

REASONABLE DOUBT.

See INTOXICATING LIQUOR, 5.

RECEIPT.

See CONTRACT, 3.

RECEIVER.

See BOND, 2.

1. *Power to Appoint.*—The courts of this State, under the code have the same power, for the same purposes and under the same emergencies, to appoint receivers, as had the courts of equity before the adoption of the code. *Bitting v. Ten Eyck, 357*
2. *Same.—Action of Ejectment.—Crops.*—In an ejectment suit it is no objection to an application for a receiver to take charge of the crops, that no reason is shown why the action can not be speedily tried and the rights of the parties thereby saved. *Ib.*
3. *Same.—Practice.—Jury Trial.—Change of Venue.*—The appointment of a receiver, in a pending action, is made by the court upon motion without the formation of issues, and without the aid of a jury, the evidence consisting of the verified application and such affidavits and depositions as the parties may offer. An application for a change of venue from the county does not affect the power of the court to make the appointment. *Ib.*
4. *Same.—Pleading.—Practice.*—An unsworn denial is not a good answer to an application for the appointment of a receiver in a pending action, and may be stricken out on motion; the sustaining of a demurrer to such answer is not available error. *Ib.*

RECORD.

See INSTRUCTIONS, 8; JUDGMENT, 8; PRACTICE, 8, 14; SUPREME COURT, 7, 16, 27.

REDEMPTION.

1. *Judgment.—Mortgage.—Priority of Liens.—Merger.—Conveyance.—Assignment.—Judgment Creditor.*—A., owning certain real estate, mortgaged it to B., and then conveyed it to C., after which C. mortgaged it to D., and thereafter E. recovered two judgments against C. which became liens upon the land; E. purchased the land upon the first judgment

rendered, obtained a deed and conveyed the land to F., who thereafter redeemed, under the act of June 4th, 1861, from a sale made upon the mortgage executed to B., and who paid taxes accrued upon the land, then brought an action to have a lien declared upon the land as against D., the second mortgagee, for the amount of money paid in redemption of the property from the sale of B., and for the amount paid for taxes.

Held, that the lien of E., by virtue of his second judgment, was not merged in the legal title acquired by his purchase under the first judgment, and that notwithstanding the title thus acquired he was still a judgment creditor and entitled to redeem the property from such foreclosure sale.

Held, also, that the conveyance of the property thereafter by E. to F. operated as an assignment of said judgment, and that F. was thereafter authorized to redeem from such sale.

Held, also, that the lien acquired by the redemption was prior to the lien of D., the second mortgagee, though his lien was prior to the lien of the judgment by virtue of which the redemption was made.

McClain v. Sullivan, 174

2. *Sheriff's Sale.—Time of Redemption.—Sheriff's Deed.—Estoppel.*—It is competent for the purchaser of real estate at sheriff's sale, to suffer the land to be redeemed from such sale, after the expiration of the year allowed by law for such redemption and before the execution of the sheriff's deed, and if he agree to such redemption, and accept the redemption money, he will be estopped to deny the right to redeem.

Taggart v. McKinsey, 392

3. *Same.—Effect of Redemption.*—The effect of a redemption is to vacate and set aside the sheriff's sale of the real estate, and to restore the same and the title thereto precisely as they were held prior to the sale. *Ib.*

RELATOR.

See ATTORNEY GENERAL; COUNTY TREASURER, 1; MANDATE.

RELEASE OF SURETY.

See PRINCIPAL AND SURETY, 1.

REMITTITUR.

See SUPREME COURT, 2.

RENTS AND PROFITS.

See LANDLORD AND TENANT; TAXES, 5.

REPEAL OF STATUTE.

See COUNTY TREASURER, 2.

REPLEVIN.

See CONTRACT, 13; EXECUTION, 1.

1. *Replevin Bond.—Verdict.—Value of Property.—Damages.*—The failure of the jury, in replevin, to assess the value of the property, as the statute requires, will not prevent the defendant from recovering its value, in a suit on the undertaking, when return is adjudged and is not made, or damages for injury to the goods while held by the plaintiff.

Yelton v. Slinkard, 190

2. *Same.—Measure of Damages.*—When there is a judgment of return against the plaintiff in replevin, and he fails to return some of the goods, and returns the rest injured by bad packing and storage, the measure of damages in a suit on his undertaking is the value of the goods not returned, with six per cent. per annum from the time of replevin, and the deterioration in value of those returned resulting from the causes named, with six per cent. per annum from the date of their return. *Ib.*

3. *Title.—Contract of Sale.*—An answer in replevin for wheat is good which avers that the only right of the plaintiff to the wheat is conferred by a written contract, as follows: "An article of agreement, made this 25th day of September, 1879, between H. B. and D. The said D. having purchased of H. B. one hundred acres of growing wheat, at its market price per bushel when delivered * * in Kokomo, Ind., to be harvested and cared for in a good husband-like manner, and delivered in good merchantable order; sixty acres of the wheat being on the home farm where he now resides, and forty acres on the farm * * belonging to him and E. B.," and that there had been no delivery of the wheat to D. The contract was executory and passed no title.

Dixon v. Duke, 434

4. *Same.—Judgment.*—In replevin against several, if the plaintiff fails to show title in himself, the defendants are entitled to a joint judgment.

Ib.

REPLEVIN BAIL.

1. *Contract.*—An undertaking of replevin bail is a contract.
Maloney v. Newton, 565
2. *Same.—Execution.—Exemption.—Waiver.*—Where the right to the benefit of an exemption law exists by statute, it can not be waived by contract prior to the issuing of the execution. *Ib.*
3. *Same.—Judgment in Bastardy Prosecution.*—A resident householder, who becomes replevin bail on a judgment obtained against a defendant in a prosecution for bastardy, is entitled to the benefit of the exemption law. *Ib.*

RES ADJUDICATA.

See ATTACHMENT, 2; DECEDENTS' ESTATES, 12; LANDLORD AND TENANT, 1; MORTGAGE, 2; SUPREME COURT, 5; TOWN, 3.

RESCISSION.

See CONTRACT, 2, 3; VENDOR AND VENDEE, 4.

REVIEW OF JUDGMENT.

See PRACTICE, 13, 17.

SALE.

See ATTACHMENT; CONTRACT, 3; DECEDENTS' ESTATES, 5, 6; HUSBAND AND WIFE, 7; INTOXICATING LIQUORS; MARRIED WOMAN, 3; MORTGAGE, 6, 12; PARTNERSHIP, 6; REPLEVIN, 3; SHERIFF'S SALE; TAXES, 4 to 9.

1. *Contract.—Statute of Frauds.—Execution Creditor.*—An execution creditor can not question a sale of property made by his debtor, merely because the contract of sale is within the statute of frauds. Parties to the contract and their privies only can do so. *Dixon v. Duke, 434*
2. *Same.—Growing Crops.—Title.—Delivery.*—Where a growing crop is sold, and either delivery or payment remains to be done, title does not pass. *Ib.*

SCHOOL FUND MORTGAGE.

See MORTGAGE, 5 to 7, 12.

SCHOOL LAW.

See ATTORNEY GENERAL, 1; MORTGAGE, 5 to 7.

Public Schools.—Township Trustee.—Colored Children.—Enumeration.—Mandate.—The township trustee will not be required by mandate to establish separate schools for colored children, unless it is shown to be practicable; nor will he, unless such separate school be practicable, be required by mandate to make separate lists of such children, as provided by section 4472, R. S. 1881. *State, ex rel., v. Grubb, 213*

SEAL.

See JUDGMENT, 6.

SEDUCTION.

1. *Promise.—Contract.—Consideration.*—A complaint by a woman for her own seduction, which shows by its averments that she was induced to yield her person to the defendant by the promise of a pecuniary consideration, which he has refused to perform, is bad on demurrer.
Wilson v. Enncorth, 399
2. *Same.—Public Policy.*—Such a contract, being immoral and vicious, is against public policy and void.
Ib.

SERVICE OF PROCESS.

See JUDGMENT, 3 to 5.

SET-OFF.

See DECEDENTS' ESTATES, 6; PROMISSORY NOTE, 2; REAL ESTATE, ACTION TO RECOVER, 2.

SHERIFF.

See JUDGMENT, 4, 5.

SHERIFF'S SALE.

See MARRIED WOMAN, 3; REDEMPTION.

1. *Notice.—Equity.*—A purchaser of the legal title to lands at a sheriff's sale, who, before completing his purchase, receives notice of an equity in the lands held by another than the execution defendant, takes subject to such equity.
Heck v. Fink, 6
2. *Notice by Publication.—Posting Notices.—Construction of Statute.*—Under section 467 of the civil code of 1852, sec. 757, R. S. 1881, the advertisement of a sheriff's sale of real estate, "for at least twenty days successively," has exclusive reference to posting up written or printed notices of the sale, and does not qualify or control the provision requiring the advertisement by publication in a newspaper of the county, for three weeks successively, which means a publication for twenty-one days, excluding either the date of the first publication or the day of the sale.
Smith v. Rowles, 264
3. *Return.*—A proper sale of lands by a sheriff, by virtue of a proper decree issued to him authorizing it, and a sufficient deed made by him at the proper time, there having been no redemption, vest a good title in a stranger who purchases, as against the defendants in the decree, though the sheriff, by mistake, fails to endorse a return on the decree in his hands.
Lovely v. Speisshoffer, 454; Schlarb v. Simons, 601
4. *Same.—Collateral Attack.—Ejectment.*—In ejectment by the purchaser at sheriff's sale, against the defendant in the execution, the latter can not attack the sale save for causes which render it, not voidable merely, but absolutely void.
Ib.

SPECIAL FINDING.

See PRACTICE, 16; VERDICT.

Exception to Conclusion of Law.—An exception to the conclusions of law concedes, for the purposes of the exception, that the facts are correctly found.
Braden v. Graves, 92; Gregory v. Van Voorst, 108

STATE AUDITOR.

See MORTGAGE, 6.

STATUTE.

See CONSTITUTIONAL LAW.

STATUTE CONSTRUED.

See CITY, 2, 3; CONFLICT OF LAWS, 2; CONTRACT, 13; COUNTY COMMISSIONERS; COURTS, 2; DESCENTS; MARRIED WOMAN, 3; PARTITION; REAL ESTATE, ACTION TO RECOVER, 1, 2; SHERIFF'S SALE, 2; STATUTE OF LIMITATIONS, 2; SUPREME COURT, 26, 27; TAXES; TRUST AND TRUSTEE, 1.

STATUTE OF FRAUDS.

See MARRIED WOMAN, 4; SALE.

STATUTE OF LIMITATIONS.

See DECEDENTS' ESTATES, 14; HUSBAND AND WIFE, 2; INTOXICATING LIQUOR, 4; REAL ESTATE, ACTION TO RECOVER, 2; TAXES, 3.

1. *Practice. — Demurrer.*—The statute of limitations is not available on demurrer to a complaint unless it affirmatively appears that the case is not within any of the exceptions to the statute. *Wilson v. Ensworth*, 399
2. *Claims Against Decedents' Estates. — Practice. — Pleading. — Statute Construed.*—Under the provisions of the act of February 4th, 1881 (Acts 1881, p. 20), until September 19th, 1881, the statute of limitations must have been pleaded to a claim against a decedent's estate. *Candy v. Coppock*, 594

STATUTORY REMEDIES.

See CRIMINAL LAW, 15.

STOCKHOLDER.

See CORPORATION.

STREETS.

See CITY, 1; HUSBAND AND WIFE, 6; NEGLIGENCE, 1; TOWN.

SUBMISSION.

See SUPREME COURT, 13, 15.

SUBROGATION.

See MORTGAGE, 4; PRINCIPAL AND SURETY, 2.

SUMMONS.

See JUDGMENT, 3 to 5.

SUPERIOR COURT.

See COURTS, 1.

SUPERSEDEAS.

See APPEAL BOND.

SUPREME COURT.

See APPEAL BOND; ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CRIMINAL LAW, 28, 29, 40, 41, 43; INSTRUCTIONS, 5, 8; MORTGAGE, 2, 3; NEW TRIAL, 4, 6; PLEADING, 19; PRACTICE, 2.

1. *Practice. — Evidence.*—Where a good defence has been erroneously stricken out, the Supreme Court will reverse the cause. and will not examine the evidence. *Wilson v. Monticello*, 10
2. *Excessive Damages.*—Where the damages assessed are excessive, the judgment will not be reversed for such cause if the successful party will remit the excess. *Trentman v. Wiley*, 33
3. *Harmless Error.*—There can be no available error in sustaining a demurrer to one paragraph of a complaint, where the plaintiff has the full benefit of the facts properly pleaded therein under an issue formed on another paragraph. *Whiteman v. Harriman*, 49
4. *Verdict. — Erroneous Instruction.*—Where a verdict is clearly right on the

- evidence, the Supreme Court will not disturb it, though erroneous instructions have been given. *Ashley v. Fireman*, 55
5. *Res Adjudicata.—Decisions of Supreme Court.*—The decision of the Supreme Court upon a question, where the case is reversed, governs in all subsequent stages of the case, even in the Supreme Court upon a subsequent appeal. *Board, etc., v. Pritchett*, 68
 6. *Appeal.—Assignment of Errors.—Appellant's Complaint.—Dismissal.*—On an appeal to the Supreme Court the appellant must, under section 655, R. S. 1881, enter on the transcript a specific assignment of all errors relied upon. The assignment of errors constitutes the complaint of the appellant in the Supreme Court, and, in the absence of such an assignment, the appeal will be dismissed. *Deputy v. Hill*, 75
 7. *Practice.—Witness.—Question.—Exception.—New Trial.—Available Error.*—Where an objection to a question put to a witness is sustained by the court, the party can not, by merely saving an exception to such ruling and assigning the same as cause for a new trial, get an error into the record which will be available for the reversal of the judgment. It must also appear that he stated to the trial court the evidence which he expected to elicit by the answer. *Whitehead v. Mathaway*, 85
 8. *New Trial.—Weight of Evidence.*—The doctrine is of universal application that the Supreme Court will not disturb a verdict or finding on the evidence, if there be parol evidence tending to support it. *Carmichael v. Cox*, 151; *Berndt v. Reitz*, 602
 9. *Practice.—Waiver.—Brief.*—A reason assigned as a cause for a new trial, but not discussed in appellant's brief, is considered waived. *Wright v. Abbott*, 154
 10. *Same.—Instruction.—New Trial.—Assignment of Error.*—An assignment of error based upon the overruling of a motion for a new trial, which motion assigned as a cause therefor, "that the court erred in refusing the instruction asked for by defendant," is too general to be considered by the Supreme Court. *Ib.*
 11. *Same.—Presumption.*—Where the instructions given are not in the record, the Supreme Court will presume that other instructions asked were properly refused. *Ib.*
 12. *Evidence.—Instruction.—Harmless Error.*—Where the evidence clearly sustains the verdict, the judgment will not be reversed on account of an instruction not strictly correct. *Cassady v. Magher*, 228
 13. *Decedents' Estates.—Appeal Bond.—Waiver.—Motion to Dismiss.*—After submission by agreement, an appeal will not be dismissed for want of an appeal bond as required by sections 189 and 190, 2 R. S. 1876, p. 557. *Pedrick v. Post*, 255
 14. *Practice.—Cross-Examination.*—Where a cross-examining question is excluded, it is not necessary in order to make an available question in the Supreme Court, that the evidence expected to be elicited shall be stated to the trial court. *Heagy v. State, ex rel.*, 260
 15. *Brief of Appellant.—Rule 14.—Dismissal of Appeal.*—Rule 14 of the rules of the Supreme Court gives the appellant sixty days after the submission of the cause in which to file his brief, and provides that, if such brief is not filed within the time limited, the appeal shall be dismissed; but the rule is complied with by a brief stating clearly points relied upon, and this will not preclude appellant from afterwards filing a more elaborate brief. *Heckelman v. Rupp*, 286
 16. *Cause for New Trial.—Bill of Exceptions.*—The statements in a motion for a new trial, as causes therefor, are not regarded as true by the Supreme Court, unless their truth is shown by a bill of exceptions properly in the record. *Ib.*

17. *Exception.—Waiver.*—At the same term of court at which a judgment has been rendered, a new trial may be granted upon oral motion, and unless an exception be taken at the time, error can not be assigned upon the ruling. *Cox v. Dill, 334*
18. *Cross Complaint, Separate Trial of Issues on.—Partition.*—If, in an action for partition, issue is joined upon a cross complaint of one of the defendants claiming a part of the land, and that issue be tried separately, the action on the petition being continued, no question can be made, on appeal from the judgment on the cross complaint, in respect to the petition or the proceedings upon it. *Ib.*
19. *Weight of Evidence.*—Where the evidence in the record fairly tends to sustain the verdict on every material point, the Supreme Court will not disturb the verdict on the weight of the evidence. *Taggart v. McKinsey, 392*
20. *Judge.—Postponement of Trial.—Practice.*—Objection to the action of the court in setting down a cause for immediate trial before a judge specially appointed to try the cause is not available in the Supreme Court unless the grounds of objection are shown by bill of exceptions. *Cox v. Stout, 422*
21. *Practice.—Error.*—That a demurrer has been sustained to the answer of a defendant who does not appeal, can not be available error to another defendant who does appeal. *Ib.*
22. *Same.*—An error which does not seem to have injured a defendant who appeals, there being others who do not appeal, is not available. *Ib.*
23. *Evidence.—Practice.*—Where evidence has been admitted without objection, or without any ground of objection having been stated in the court below, no question can be made upon it in the Supreme Court. *Ib.*
24. *Same.*—An objection to evidence, that "it is inadmissible and incompetent," is too indefinite to present any question. *Ib.*
25. *Instructions.—Evidence.*—An instruction to the jury to find for a defendant can not be deemed erroneous by the Supreme Court, where the record does not contain any of the evidence. *Ricketts v. Richardson, 508*
26. *Amount in Controversy.—Jurisdiction.*—To give the Supreme Court jurisdiction in cases originating before justices of the peace, the amount in controversy, exclusive of interest and costs, must exceed fifty dollars; and when the plaintiff recovers that sum or is satisfied with the amount recovered, and the defendant is merely resisting the recovery, claiming no set-off or counter-claim, the amount so recovered is all that is in controversy within the meaning of section 632, R. S. 1881. *Louisville, etc., R. W. Co. v. Coyle, 516*
27. *Practice.—Record on Appeal.—Bill of Exceptions.—Affidavit and Motion.—Setting Aside Default.*—Under section 559 of the civil code of 1852 (section 650, R. S. 1881), an affidavit and motion to set aside a default, and the ruling of the court thereon, will not constitute a part of the record on appeal to the Supreme Court, unless they are made a part of the record by a bill of exceptions or by an order of the court. *Hancock v. Fleming, 571*
28. *Criminal Law.—Evidence.*—The Supreme Court will reverse a judgment of conviction in a criminal case when the evidence in the record is totally insufficient to support it. *Peacher v. State, 601, 602*

SURPLUSAGE.

See CRIMINAL LAW, 45.

SURPRISE.

See NEW TRIAL, 1, 4.

TAXES.

See COUNTY TREASURER, 1; DECEDENTS' ESTATES, 6.

1. *Real Estate of National Banks.—How Taxed.—Statutes Construed.*—Real estate owned by a National bank, by the provisions of the statutes, State and National, as construed together, should be assessed for taxation as realty in the township where situated, and not as a part of the capital stock of the bank. *Loftin v. Citizens Nat'l Bank, 341*
2. *Quieting Title.—Tax Title.—Evidence.*—In an action to quiet the title to real estate, where the defendant claims title to the land under a tax deed, he must show by his evidence that the statute had been strictly complied with in every step required to be taken, to authorize the sale for taxes and the execution of the tax deed. *Farrar v. Clark, 449*
3. *Same.—Constitutional Law.—Statute Construed.—Statute of Limitations.*—Section 250 of the act of December 21st, 1872, to provide for a uniform assessment of property and for the collection and return of taxes thereon, is not repugnant to any provision either of the State or Federal Constitution, and is a constitutional and valid enactment; but it must be strictly construed, and can not be held applicable to an equitable suit to quiet the title to real estate. *Ib.*
4. *Tax Sale.—Possession Under Certificate.—Statute Construed.*—Under section 203 (1 R. S. 1876, p. 120), the certificate of a tax sale entitles the holder to the possession of the premises described only in case the sale was regular and valid. *Barton v. McWhinney, 481*
5. *Same.—Liability for Rents and Profits.*—The holder of an invalid certificate of tax sale is not accountable to a junior lien-holder for rents of the land, unless he has had possession under his certificate or has received rents. *Ib.*
6. *Same.—When Invalid.*—A tax sale of land is invalid when personalty might have been seized and sold. *Ib.*
7. *Same.—Municipal Tax Sale.*—The act of March 11th, 1875, makes the assessment law of December 21st, 1872, applicable to towns and cities, and, consequently, the holder of an invalid city tax deed is entitled to 25 per cent. interest, as provided in that law. *Ib.*
8. *Same.—Practice.—Pleading.*—Upon a complaint to recover the possession or to quiet the title of land, the holder of an invalid tax deed may have a decree enforcing the statutory lien given in such cases. *Ib.*
9. *Same.—Interest.*—The act of March 10th, 1879, has reference to interest on contracts for the forbearance of money or upon debts, and does not repeal the provisions of the assessment law in respect to interest upon invalid tax deeds. *Ib.*

TENDER.

To keep a tender good the money must be brought into court.

Smith v. Felton, 223

TESTIMONY.

See BILL OF EXCEPTIONS, 1.

THREATS.

See MORTGAGE, 10.

TIME.

See CONTRACT, 4; CRIMINAL LAW, 2; INTOXICATING LIQUOR, 4.

TITLE.

See EVIDENCE; FRAUDULENT CONVEYANCE, 2, 3; LANDLORD AND TENANT, 2; MORTGAGE, 1; REAL ESTATE, ACTION TO RECOVER, 3; REDEMPTION; QUIETING TITLE; REPLEVIN, 3, 4; SALE, 2; SHERIFF'S SALE, 3, 4; TAXES, 2, 3.

TOLL-GATE.

See CRIMINAL LAW, 3 to 5.

TOWN.

See CITY; NEGLIGENCE, 1; PRINCIPAL AND SURETY; TAXES, 7.

1. *Nuisance.—Pleading.*—Complaint by an incorporated town to recover the amount of a judgment which it had been compelled to pay, alleging an unlawful excavation, wrongfully and without permission made by the defendants in a sidewalk, into which one H. fell and was injured; that H. sued the town and recovered the judgment; that the defendants were notified of the suit and defended it. Answer that the excavation was made for a stairway to the basement of a building of one of the defendants, such as was customarily made by others, with the knowledge of the town; that due care was used to avoid injury; that an unexpected caving of the earth occurred, of which the plaintiff had notice, but failed to inform the defendants, and the injury was the result of such caving, and could have been avoided by a trifling expense.
Held, that the answer was insufficient, because it did not aver permission from the town to make the excavation, but only evidence tending to show permission. *McNaughton v. Elkhart*, 384
2. *Same.—Streets.—Negligence.*—An excavation in a sidewalk of an incorporated town, made without leave, is a nuisance *per se*, and the wrong-doer is liable to the town for such damages as it incurs to persons injured thereby; and this liability does not depend upon the negligence or care with which the excavation was made or guarded. *Ib.*
3. *Same.—Judgment.—Res Adjudicata.*—In such case, where the town, upon being sued, notified the wrong-doer thereof, and that it will look to him for indemnity, the judgment concludes him, as to the facts thereby adjudicated. *Ib.*
4. *Same.—Principal and Agent.*—Where an act done is unlawful, creating a nuisance *per se*, an agent who actively participated therein, is liable alike with his principal. *Ib.*

TOWNSHIP TRUSTEE.

See SCHOOL LAW.

TRANSCRIPT.

See COURTS, 1.

TRESPASS.

See CRIMINAL LAW, 3, 45.

TRIAL.

See PRACTICE, 9; SUPREME COURT, 18.

TRUST AND TRUSTEE.

- See CONFLICT OF LAWS, 2; CONVERSION, 1; DECEDENTS' ESTATES, 12; FRAUDULENT CONVEYANCE, 3; HUSBAND AND WIFE, 2 to 5, 12; WILL, 3, 4.
1. *Statute Construed.—Constitutional Law.*—Section 2988, R. S. 1881, requiring trustees to be residents of this State, has no retrospective operation according to its terms, nor could the Legislature have given it such operation without impairing the validity of contracts previously entered into. *Thompson v. Edwards*, 414
 2. So long as moneys held in trust can be distinctly identified, the trust may be enforced against any one into whose hands it comes; *aliter* where this can not be done. *McComas v. Long*, 549

3. *Bond.—Executor.—Limit of Liability.*—The bond of an executor, given to secure the faithful discharge of his duties as executor, can not be construed as conditioned for the faithful discharge of his duties as trustee of a trust created by the will. *Hinds v. Hinds, 312*
4. *Bond of Trustee.—Duty of Court.*—It is the duty of the court having jurisdiction of an express trust to require the trustee to execute bond, with sufficient sureties, conditioned for the faithful performance of the duties of his trust, and the preservation of the trust estate. *Ib.*

TURNPIKE.

See CRIMINAL LAW, 3 to 5.

USE AND OCCUPATION.

See REAL ESTATE, ACTION TO RECOVER, 1, 2.

VARIANCE.

See CONVERSION, 2.

VENDOR AND VENDEE.

See CONTRACT, 5; MARRIED WOMAN, 4, 5; MORTGAGE, 1, 3, 4; WILL, 1.

1. *Vendor's Lien.—Acceptance of Worthless Security.—Fraud.—Waiver.—Diligence.*—The acceptance of worthless securities for the payment of purchase-money, induced by the fraudulent representations of the purchaser, is not a waiver of the vendor's lien for unpaid purchase-money of real estate, but suit must be brought promptly upon discovery of the fraud, if the rights of others may be affected by delay. *Himes v. Langley, 77*
2. *Same.*—A vendor's lien may be enforced for a part only of the purchase-money. *Ib.*
3. *Same.—Promissory Note.*—When land is exchanged for promissory notes of other persons, which the vendor is induced by fraud to receive in exchange for the land, no price having been fixed for the land, and no credit given for purchase-money, nor any promise by the vendee to make further payments, no right to a vendor's lien exists. *Ib.*
4. *Same.—Contract.—Rescission.*—A suit to rescind a contract for fraud, whereby the plaintiff was induced to receive worthless notes in exchange for real estate, must be brought promptly upon the discovery of their worthlessness, and dealing with the notes afterwards as his own forfeits the right to rescind. *Ib.*

VENDOR'S LIEN.

See MORTGAGE, 3; VENDOR AND VENDEE.

VENIRE DE NOVO.

See VERDICT, 3.

VERDICT.

See BOND, 3; DEMURRER TO EVIDENCE, 2; JURY, 1; NEGLIGENCE, 6; PARTNERSHIP, 5; PRACTICE, 19; REPLEVIN, 1; SUPREME COURT, 4, 8, 12, 19.

1. *Interrogatories.*—A motion for judgment upon the answers of the jury to interrogatories can not be sustained where the facts found do not control the general verdict. *Trentman v. Wiley, 33*
2. *Special Findings.—Practice.—Evidence.*—An inconsistency between a general verdict and the answers by the jury to special questions of fact, which will justify a verdict upon the latter against the former, must be irreconcilable in view of the pleadings alone, without reference to the evidence. *Louthain v. Miller, 161*
3. *Practice.—Venire de Novo.*—A *venire de novo* will not be granted where the verdict of the jury finds the substance of the issues, and is free from

uncertainty or ambiguity, and is not so defective as to prevent the rendition of judgment thereon. *Heckelman v. Rupp, 286*

4. *Special Verdict.—Judgment.—Practice.*—A defendant, deeming himself entitled to judgment on a special verdict, may move for such judgment, and the question is thereby presented whether the plaintiff is entitled to judgment. *Dixon v. Duke, 437*
5. *Same.—Burden of Proof.*—If a special verdict do not find such facts as entitle the party having the burden of proof to judgment, then a motion by the adversary for judgment should be sustained. *Ib.*
6. *Same.—Special Finding.*—A special verdict should contain only facts found, and if it states either evidence or conclusions of law, such statements should be disregarded. *Ib.*
7. A general verdict or finding need not show the facts on which it rests. It need only state a conclusion broad enough to cover the issues. *Barton v. McWhinney, 481*

VOLUNTARY ASSIGNMENT.

See HUSBAND AND WIFE, 7.

WAIVER.

See EXEMPTION LAW; INSURANCE; NEW TRIAL, 2; PRACTICE, 18; REPLEVIN BAIL; SUPREME COURT, 9, 13, 17; VENDOR AND VENDEE, 1.

WARRANTY.

See DECEDENTS' ESTATES, 2; PROMISSORY NOTE, 1.

WEIGHT OF EVIDENCE.

See SUPREME COURT, 8, 19.

WIDOW.

See HUSBAND AND WIFE, 10; MARRIED WOMAN, 6; MORTGAGE, 1; PARTITION; WILL, 1.

WILL.

See DEMURRER TO EVIDENCE, 3.

1. *Devise During Widowhood.—Election.—Descent.*—Where a husband dies, leaving a wife and two children surviving him, having devised his land to his wife during widowhood, and she elects to accept the provision made for her by will, her estate is limited in duration to the period of her widowhood; and a purchaser, through a mortgage executed by her after a second marriage, acquires no title to any part of the land. And the fact that no disposition of the land was made after the wife ceased to be a widow, did not entitle her to any portion of it under the law, as her election to take under the will precluded any such claim. *O'Harrow v. Whitney, 140*
2. *Construction.—Intention.*—In construing a will, it is the duty of the court to ascertain and carry into effect the intention of the testator, if it can be done; and this intention is to be ascertained from an examination of all the provisions of the will, in relation to the subject of inquiry. *Hinds v. Hinds, 312*
3. *Same.—Bond.—Executor.—Trust and Trustee.—Limit of Liability.*—The bond of an executor, given to secure the faithful discharge of his duties as executor, can not be construed as conditioned for the faithful discharge of his duties as trustee of a trust created by the will. *Ib.*
4. *Same.—Bond of Trustee.—Duty of Court.*—It is the duty of the court having jurisdiction of an express trust to require the trustee to execute bond, with sufficient sureties, conditioned for the faithful performance of the duties of his trust, and the preservation of the trust estate. *Ib.*

WITNESS.

See CRIMINAL LAW, 2, 28; NEW TRIAL, 1; PRACTICE, 12; RAILROAD, 2; SUPREME COURT, 7, 14.

1. *Handwriting.—Expert.*—An expert may state his opinion whether or not the writing in question is in a feigned hand. *Cox v. Dill, 334*
2. *Evidence.—Competency of Party.*—The plaintiff in ejectment had contracted in writing for the sale of the land to the defendant, and upon a decree of foreclosure of his lien as vendor had repurchased the land and had obtained the sheriff's deed; and the children of the principal defendant, having been admitted to defend, set up that the contract of sale, through made in the name of their father, was for the benefit of their mother, who was not made a party to the foreclosure, and that as her heirs they had her rights.
Held, that there was no error in permitting the plaintiff to testify concerning the possession of the premises by the principal defendant before the commencement of the action. *Bitting v. Ten Eyck, 357*
3. *Foundation for Impeachment.—Time and Place.*—An impeaching question which calls for a statement made "in June last, in Hazelton, Indiana," is sufficiently definite as to time and place, when the principal witness admits a conversation at such time and place, though denying the particular statement imputed to him.
Evansville, etc., R. R. Co. v. Montgomery, 494

WRITTEN INSTRUMENT.

See PLEADING, 1, 13, 15.

Construction.—Instruction.—The construction of a written instrument is for the court, and when by the face of the instrument it is so the court may tell the jury that "upon its face it purports to be executed for an honest purpose."
Louthain v. Miller, 161

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